LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 1 6 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 742.

CITY OF CLEVELAND, OHIO,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,

and

CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRONIS J. KLEMENTOWICZ,
Director of Law,

WILLIAM T. MCKNIGHT,
JAMES L. HARKINS, JR.,
Assistant Directors of Law,
204 City Hall,
Cleveland, Ohio 44114,
Attorneys for Petitioner.

November 15, 1965.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-6647

TABLE OF CONTENTS.

Opinions Below ---- 1

Jurisdiction ---- 2

Questions Presented ---- 2

Constitutional Provisions Involved ---- 3

Statement of the Case ---- 3

The Commission Has Confiscated the Ratepayer's Property ---- 4

The Company's Coal Escalation Formula ---- 7

The Commission Has Acted Discriminatorily and Retroactively ---- 8

The Federal Questions Were Timely Raised ---- 9

Petitioner's Position ---- 10

Reasons For Granting the Writ ---- 10

I. The Right of the Ratepayer to the Protection of the Fourteenth Amendment Against Confiscatory Rates Set by State Regulatory Bodies Is a Matter of Extreme General Importance Which Has Never Been Decided by This Court ---- 10

II. The Allowance of an Excessive Return to a Privately Owned Utility Is the Equivalent of Granting It the Power to Levy Taxes ---- 13

III. The Commission Has Unconstitutionally Delegated Its Powers to the Company ---- 14

IV. Contrary to the Decisions of This Court the Commission Has Arbitrarily Granted a Discriminatory Rate Increase Which Violates the Petitioner's Freedom of Contract ---- 15

Conclusion ---- 17

Appendix A. Findings and Order of the Public Utilities Commission of Ohio ---- 18

Appendix B. Opinion of the Supreme Court of Ohio 36

Appendix C. Journal Entries of the Supreme Court of Ohio ---- 40

TABLE OF AUTHORITIES.

Cases.

Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia, 262 U. S. 679 (1923) ---------- 10

Carter v. Carter Coal Co., 298 U. S. 238, 80 L. ed. 1160 ---------- 14

Davis v. Mills, 194 U. S. 451 (1904) ---------- 6

Dayton, City of, v. Public Utilities Commission of Ohio, 174 Ohio State Reports 160 (1962) ---------- 11

Faitoute Iron & Steel Co. v. Asbury Park, 316 U. S. 502 (1942) ---------- 6

Mountain Timber Co. v. Washington, 243 U. S. 219 (1917) ---------- 7

Near v. Minnesota, 283 U. S. 697 (1931) ---------- 7

Nebbia v. New York, 291 U. S. 502 (1934) ---------- 15, 16

North Laramie Land Co. v. Hoffman, 268 U. S. 276 (1925) ---------- 7

Seattle Trust Co. v. Roberge, 278 U. S. 116 ---------- 14

West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330 ---------- 16

Constitution.

Constitution of the United States, Amendment XIV, Section 1 ---------- 2, 3, 4, 9, 10, 12, 15, 16

Statutes.

28 U. S. C. Sec. 1257(3) ---------- 2

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. _____.

CITY OF CLEVELAND, OHIO,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,

and

CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

The petitioner prays that this Court issue a writ of certiorari to review the judgment of the Supreme Court of the State of Ohio entered on the seventh day of July, 1965, in the case of City of Cleveland, Ohio, Appellant, vs. Public Utilities Commission of Ohio, Appellee, Cleveland Electric Illuminating Co., Intervening Appellee, on appeal from the Public Utilities Commission of Ohio.

OPINIONS BELOW.

The Public Utilities Commission of Ohio in its *"Findings and Order"* of January 8, 1963, in Case No. 30,109 granted in full the amended application of the Cleveland Electric Illuminating Company for an increase in its steam rates. The Commission's *Findings and Order* of January 8, 1963, is attached hereto as Appendix A. The Commission's opinion was reported at 47 PUR 3d 44 (1963).

The opinion of the Supreme Court of the State of Ohio affirming the decision of the Public Utilities Commission (hereinafter referred to as the "Commission") is attached hereto as Appendix B. The Court's opinion was reported at 3 Ohio State 2d 82 (1965).

JURISDICTION.

Petitioner seeks a review by this Court of the Opinion of the Supreme Court of Ohio of July 7, 1965, which has an entry date of July 7, 1965. The Opinion has been appended hereto as Appendix B. The City of Cleveland's request for a rehearing was denied by the Supreme Court of Ohio on August 19, 1965.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3), since the petitioner and those whom it represents were deprived by the Public Utilities Commission of Ohio and the Supreme Court of Ohio of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED.

The fundamental questions of extreme national importance raised by this petition for a writ of certiorari are:

1. Are ratepayers of privately owned utilities protected by the Fourteenth Amendment to the Federal Constitution against the confiscation of their property through excessive rates set by state regulatory bodies?

2. May the Public Utilities Commission of Ohio deprive the petitioner and the other ratepayers of due process of law, in violation of the Fourteenth Amendment to the Federal Constitution, by granting

to the Company the unregulated power to adjust its rates according to a modified version of a coal escalation formula which had not worked except defectively in forty years?

3. May the Public Utilities Commission of Ohio deprive the petitioner and the other ratepayers of due process of law, in violation of the Fourteenth Amendment to the Federal Constitution, by ordering a retroactive rate increase to be applied in an arbitrary and discriminatory manner.

CONSTITUTIONAL PROVISIONS INVOLVED.

No statutes are involved in this case. The only constitutional provision involved is Section 1 of the Fourteenth Amendment to the Federal Constitution which is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

The Cleveland Electric Illuminating Company (hereinafter referred to as the Company) has a monopoly on the sale of steam heating service in downtown Cleveland. The operation involved is essentially a rather simple one. The Company burns coal in order to convert water into steam. The steam is then channeled through a series of pipes to

the Company's customers. The bulk of the property involved in this case consists of two steam generating plants and many sizes and kinds of underground conduit.

The Commission Has Confiscated the Ratepayer's Property.

Decades ago in less prosperous times the privately owned utilities came before this Court and asked for protection against rates set through state action which were too low. The utilities said that they were entitled to the protection of the Fourteenth Amendment to our Federal Constitution (hereinafter called the "Fourteenth Amendment") against rates which resulted in the confiscation of their property. This Court determined that they were entitled to that protection.

Petitioner appears now before this Court asking for protection against rates set by our Commission which are so excessive that they confiscate the ratepayer's property. *The Supreme Court of the United States has never spoken on this point.* The importance of this point on a nationwide basis is staggering even in this era of astronomical sums.

Ohio utility companies and counsel for the Commission now shamelessly advance the one-sided proposition that the utilities are entitled to the protection of the Fourteenth Amendment against unreasonably low rates but that the ratepayer is not entitled to protection against excessively high rates. The Supreme Court of Ohio has been deaf to our plea for protection against excessive rates and has therefore, by its silence in this and other cases, given its tacit approval to the contentions of the utilities and the Commission that the ratepayer is not protected by the Fourteenth Amendment.

There is undoubtedly a zone of reasonableness which covers the difference between the point at which the confiscation of the utility's property through an inadequate return ends and the point where the confiscation of the ratepayer's property through the allowance of an excessive return begins. The rate of return evidence introduced by the City of Cleveland established the maximum return which the applicant can be reasonably allowed. Anything in excess of that return would clearly result in the confiscation of the property of the ratepayer.

Mr. James M. Honaker, a highly qualified rate of return expert from Frankfort, Kentucky (Tr. 2448-9), testified that the maximum allowable return is $525,000 per year (Tr. 2451). Such a return would consist of an 8% rate of return on composite capitalization and a 13% rate of return on the common equity portion thereof (Tr. 2451). Mr. Honaker testified that even that return might be excessive. He stated on pages 2451-2 of the record that

> "Anything beyond this is completely out of line with the generally accepted concept of fair return. In fact, these percents are entirely too high and at first blush shock the conscience, but my stated opinion is premised upon an extreme situation, i.e., earnings outside a broad and generous zone."

Cleveland introduced the only evidence in this case as to what would be a confiscatory rate. The Commission disregarded this evidence and on page 9 of its final order in this case determined that "* * * The dollar return to which applicant is entitled for purposes of this proceeding is $680,311.11 * * *."

The vehicle employed for justifying these enormous profits is Ohio's statutory reproduction cost new valuation formula (hereinafter referred to as "RCN"). RCN is the cost of exactly duplicating all of the Company's property

at current prices even though some of the property may predate the turn of the century. The formula is applied even if the property is useless from an economic point of view. Under RCN it is not uncommon for a rate base to be more than three times as large as that which would be obtainable under an original cost rate base such as the one employed by the Federal Power Commission and most of the states of the Union. Since RCN allows an almost limitless ballooning of the rate base it is possible for a low rate of return under RCN to produce enormous rates of return on a utility's capital and common equity investments. In this case a 3.53% rate of return under RCN produced a 10% return on the Company's capital investment and over 15% on its common equity.

The fact that the Commission allowed a very modest rate of return under RCN is no justification for the allowance of a return that is excessive by all practical standards of measurement. The Constitution of the United States is intended to preserve practical and substantial rights, not to maintain intricate theories. *Faitoute Iron & Steel Co. v. Asbury Park*, 316 U. S. 502, 514 (1942); *Davis v. Mills*, 194 U. S. 451, 457 (1904).

The impracticality of RCN is readily demonstrated by the valuations attributed to the Company's property. For instance, the Company arrived at an undepreciated valuation for its much smaller Canal Road Plant buildings of $3,578,107 compared to an undepreciated valuation of $3,071,732 for its larger buildings at East 20th Street (page 1 of Company Exhibit 9). Smaller boilers were given greater valuations than larger boilers (Tr. 977-8).

Mr. Honaker was the only witness to show the practices prevailing in the money markets for measuring a company's earnings requirements. It is only Mr. Honaker's

testimony and his exhibit that present the practical standards for measuring the constitutionality of the rates set by the Commission. This Court has long held that whether state law deprives a party of his rights secured by the Constitution depends upon the law's practical application and effect. *Near v. Minnesota,* 283 U. S. 697, 708 (1931); *Mountain Timber Co. v. Washington,* 243 U. S. 219, 237 (1917). The effect of state law must be judged in the light of its application to the affairs of men as they are ordinarily conducted. *North Laramie Land Co. v. Hoffman,* 268 U. S. 276, 283 (1925).

The Company's Coal Escalation Formula.

The Company has had an escalation clause for the cost of its coal since 1920 (Tr. 743). *This clause has not worked at any time during its forty years of existence* (Tr. 743-4). If the cost of coal went up one dollar over the last decade, the Company's charges to its customers would increase by one dollar and forty cents. If the cost of coal were to go down, then the Company's revenues would decrease at an even greater rate (Tr. 687-690).

The Company never caught this defect, nor did the Commission. The Commission does not check the operation of such a formula, the administration of which is left to the discretion of the Company. The Company admitted that its formula does result in frequent changes in rates (Tr. 700-1).

After these disclosures the Company modified its formula so as to bring its working in closer harmony with current fuel costs. This, however, does not change the fact that escalation as allowed by the Commission has been and will continue to be an unconstitutional delegation by the Commission to the Company of its regulatory powers

to set rates. Furthermore, the Company's escalation clause is rather ambiguous and is dependent upon interpretations and practices of the Company (T. 747-8).

There is no protection to the petitioner and the other ratepayers against future changes in the cost of fuel which would produce similar disparities. Some of these possibilities are shown on pages 694-9 of the record. Increased efficiency resulting from modern generating plants is ignored in the so-called "fuel clause." The escalation is not based upon the cost of coal per unit of energy, but upon the cost of coal per ton even if very little is used per kilowatt hour generated.

The Commission Has Acted Discriminatorily and Retroactively.

The Commission's decision was rendered on January 8, 1963. The new rates were applied by the Company on all its bills that were rendered after January 8, 1963. On a bill rendered on January 9, 1963, the ratepayer would pay at the higher rate for one month's consumption prior to the billing date. The consumption of such a customer would have occurred entirely during a period of time when the lower rates were in effect. Due to the fact that there is a lag of almost two weeks between the date a meter is read and the date the bill is rendered, the consumption period for a customer billed on January 9, 1963, would be from about November 28, 1962, through December 27, 1962. A customer billed on January 10, 1963, would have consumed steam service from November 29, 1962, through December 28, 1962, and so on. It can be seen then that for the first two weeks after January 8, 1963, the Company's customers were billed entirely at the higher rates, when in fact the consumption took place entirely during a period of time when the lower rates were in effect.

The most signal result of this procedure is that a consumer billed on January 8, 1963, would pay the lower rates for his consumption of steam service between November 27, 1962, and December 26, 1962, while a consumer billed on January 9, 1963, would pay the higher rates for his consumption of steam service over substantially the same period of time (from November 28, 1962 through December 27, 1962). This discrimination is in violation of the Fourteenth Amendment.

The only reason advanced by either the Company or the Commission for the retroactive and discriminatory manner in which these rates were put into effect is that it is a "mechanical procedure" which is easy to administer. In short, both the Company and the Commission rely on the proposition that the *end* justifies the *means*. The proper application of the rate increases could have been devised and utilized in a "mechanical procedure." No effort has been made by either the Commission or the Company to do this.

A utility is in the position of making a continuing offer to render a service which is accepted by its ratepayers on a day to day basis through the use of said service. To alter the charge after the service has been rendered is in effect to change the terms of the agreement.

The constitutional rights of the ratepayer to make contracts and to be free of discriminatory practices on the part of the state are far too weighty to be set aside for the mere convenience of the Company.

The Federal Questions Were Timely Raised.

All of the matters complained of in this petition for writ of certiorari arose as a result of the Commission's *Findings and Order* of January 8, 1963. All of these matters were raised as error in our application to the Commis-

sion for a rehearing and in our Notice of Appeal of April 30, 1963, to the Supreme Court of Ohio. All of these matters were discussed in our initial and reply briefs before the Supreme Court of Ohio, and were the subject for an "Application for Rehearing by the City of Cleveland" to the Supreme Court of Ohio.

Petitioner's Position.

The City of Cleveland prosecutes this case both as a ratepayer and as a representative of the ratepayers served by the Company.

REASONS FOR GRANTING THE WRIT.

I.

The Right of the Ratepayer to the Protection of the Fourteenth Amendment Against Confiscatory Rates Set by State Regulatory Bodies Is a Matter of Extreme General Importance Which Has Never Been Decided by This Court.

This case raises the question about whether the Ohio ratepayer can raise the shield of the Fourteenth Amendment to the Federal Constitution against the confiscation of his property through excessive rates set by the Public Utilities Commission of Ohio for services rendered by privately owned utilities. The Supreme Court of the United States has upon many occasions granted the protection of the Fourteenth Amendment to privately owned utilities against the confiscation of their property through insufficient rates set by state regulatory bodies, *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia*, 262 U. S. 679, 683 (1923). This Court, however, has never decided whether the ratepayer

is entitled to the same protection against the confiscation of his property through excessive rates.

The Public Utilities Commission of Ohio (hereinafter referred to as the "Commission") and the Supreme Court of Ohio have consistently refused to give the equal protection of the law to the ratepayer. Counsel for the Commission on page 5 of their brief before the Supreme Court of Ohio stated:

> "* * * The constitutional protection to which a utility is entitled because of the burden of regulation cannot be extended to that utility's ratepayers, who are *not* so regulated."

This appears to reflect the thinking of the Commission itself. Counsel for the Commission also showed on page 5 of their brief that the Supreme Court of Ohio has refused in the case of *City of Dayton v. Public Utilities Commission of Ohio*, 174 Ohio State Reports 160 (1962), to consider the right of the ratepayer to claim the protection of the Fourteenth Amendment against the confiscation of his property through excessive rates set by the Commission.

The question raised by this appeal is of enormous general importance. Each year ratepayers in Ohio pay many hundreds of millions of dollars to privately owned electric, gas, telephone, water, and steam utilities in accordance with rates set by the Commission. The national total is over 20 billion dollars per year. The services provided by these utilities are necessities of life. Normally the ratepayer is unable to defend himself against the rates set by the Commission, since he must purchase these services and he lacks any real choice of competing or substitute services. Surely the property of the ratepayer can just as readily be confiscated through excessive rates as the

property of the utility can be confiscated through insufficient rates.

The utility patron is just as entitled to have his property protected from confiscation as is the utility operator. If he is not, then he does not receive the equal protection of the law guaranteed to him by the Fourteenth Amendment.

The primordial question in any case involving due process is "Has the action of the state, through any of its branches, legislative, judicial, or executive, been the cause of a deprivation of life, liberty or property?" Cleveland and other ratepayers are just as affected by the rates set by the Commission as the Company is, and we have an equal right to the protection of the Fourteenth Amendment. We should not be left at the mercy of the Commission which has shown no concern for our basic property rights.

Cleveland introduced the only evidence in this case about what return would confiscate the ratepayer's property. As previously stated, Mr. Honaker showed that the allowance by our Commission of any return in excess of $525,000 per year would confiscate our property. Mr. Honaker testified that a return of $525,000 per year would consist of an 8% rate of return on capitalization and a 13% rate of return on common equity (Tr. 2451). He stated on pages 2451-2 of the record that:

> "Anything beyond this is completely out of line with the generally accepted concept of fair return. In fact, these percents are entirely too high and at first blush shock the conscience, but my stated opinion is premised upon an extreme situation, i.e., earnings outside a broad and generous zone."

The Commission, on page 9 of its final order, allowed a return of $680,311.11 per year.

II.

The Allowance of an Excessive Return to a Privately Owned Utility Is the Equivalent of Granting It the Power to Levy Taxes.

Since time immemorial one of the principal sources of revenues to governments has been through state regulated monopolies. An interesting illustration of this is the "gabelle" or salt tax, which in large measure was responsible for the French Revolution. There is no virtual difference between being required by law to pay a tax or being required to pay the tax because it is a prerequisite to securing a necessity of life.

It seems that the tolerance of any monopoly, particularly over a necessity of life, is in effect a delegation of the power of taxation. In our country the delegation of the power of taxation by the legislature to some other body is unconstitutional. The only way that the granting of a monopoly by a municipality or a state to a privately owned corporation can be reconciled with the prohibition against the delegation of the power of taxation is when the resultant profits are not "profits" in the usual sense of the word but are nothing more than compensation for the continuing cost to the corporation of attracting and retaining the capital necessary for meeting its obligation to serve the public. Such a rationale is not available in this case, since the return set by the Commission grossly exceeds the Company's cost of attracting and retaining the capital necessary for its continued operation.

Monopolies are basically inconsistent with our way of life. The privately owned utilities have a power which, if they were not regulated, would be destructive of our fundamental rights. Monopolies have the power to take private property and to deny its owners the "pursuit of

happiness." Monopolies can only be tolerated when they are subject to strict regulation. The excessive return allowed in this case is intolerable.

III.

The Commission Has Unconstitutionally Delegated Its Powers to the Company.

This Court, in *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160, held that Congress could not delegate to a majority of miners its authority to fix minimum wages for a district or group of districts. Mr. Justice Sutherland, who wrote the majority opinion, stated at page 311:

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form * * * and a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp. v. United States*, 295 U. S. at p. 537; *Eubank v. Richmond*, 226 U. S. 137, 143; *Seattle Trust Co. v. Roberge*, 278 U. S. 116, 121-122."

The Supreme Court of the United States in *Seattle Trust Co. v. Roberge*, 278 U. S. 116, determined that the State legislature of Washington could not require that an applicant for a building permit obtain the written consent of owners of two-thirds of the property within 400 feet of the proposed building. The Court held at page 122 that:

> "* * * The delegation of power so attempted is repugnant to the due process clause of the Four-

teenth Amendment. Eubank v. Richmond, 226 U. S. 137, 143. Browning v. Hooper, 269 U. S. 396."

In this case the Commission has given the Company the unrestrained power to adjust its rates in accordance with a coal escalation formula. The Company's power is unrestrained because the Commission has not once examined the operation of the coal escalation formula during the forty years prior to the commencement of the present case. Cleveland has shown that the coal escalation formula has not worked equitably at any time during its forty years of existence (Tr. 743-4). How else can this sad fact be explained except by the obvious conclusion that our Commission never checks into the working of such formulae?

Yet, the Commission still gives the Company the power to alter at will the charges that its ratepayers must pay in accordance with a modified version of the old coal escalation formula. The Commission through its approval of the coal escalation formula continues to delegate its regulatory authority to fix rates to the Company. How could any delegation of power be more irreconcilable than this with the due process clause of the Fourteenth Amendment to our Federal Constitution?

IV.

Contrary to the Decisions of This Court the Commission Has Arbitrarily Granted a Discriminatory Rate Increase Which Violates the Petitioner's Freedom of Contract.

This Court, in *Nebbia v. New York*, 291 U. S. 502 (1934), held that discriminatory prices established by governmental action were illegal. As we showed before, the Company did not apply the same rates to the same periods of consumption. Instead the Company, pursuant to

the Commission's orders, applied the increased rates to all its billings after January 8, 1963, regardless of the period of consumption involved. Thus the ratepayer's bill for services rendered before January 9, 1963, was dependent not upon the rate that was in effect at the time of his consumption but upon whether or not he happened to be billed after January 8, 1963. As we also showed in our statement of the case, the practice of basing rates upon the billing date rather than on the date the service was rendered resulted in different charges for the same service rendered over the same period of time. Such discrimination is clearly in violation of this Court's findings in *Nebbia v. New York*, 291 U. S. 502 (1934).

Furthermore, by this action the Commission has unreasonably interfered with the ratepayer's freedom of contract. Liberty of contract is an inherent and inalienable right, universally recognized to be within the protection of the Fourteenth Amendment to our Federal Constitution, *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330.

A utility is in the position of making a continuing offer to render a service which is accepted by its ratepayers through the use of said service. To alter the charge after the service has been rendered is in effect to change the terms of the agreement. The Commission's order that the Company's proposed "* * * tariff schedules may become effective on the first billing date subsequent to the filing of such tariff schedules" (page 9 of the Commission's Findings and Order of January 8, 1963) failed to recognize the fact that the first billings would largely be for services rendered prior to the permitted date of the rate increase. The result of this retroactive procedure was to allow the Company to alter the charges after the ratepayer had accepted the Company's offer to render service under the

prior rates, and had actually already received the service. The Commission's allowance of a retroactive rate increase is an arbitrary alteration of the agreement entered into between the Company and its customers. The ratepayer was thereby denied his freedom of contract in violation of the Fourteenth Amendment.

CONCLUSION.

WHEREFORE, the petitioner prays that a writ of certiorari directed to the Supreme Court of the State of Ohio may issue under the seal of this Honorable Court in this cause and that upon such review the judgment of the Supreme Court of Ohio entered on July 7, 1965, and the "Findings and Order" of the Commission of January 8, 1963, be vacated, reversed, and set aside and that this case be remanded to the Supreme Court of Ohio with instructions to proceed in accordance with the rulings of this Court.

Respectfully submitted,

BRONIS J. KLEMENTOWICZ,
Director of Law of Cleveland,

WILLIAM T. MCKNIGHT,
Assistant Director of Law,

JAMES L. HARKINS, JR.,
Assistant Director of Law,
City Hall, Room 204,
Cleveland, Ohio 44114,
Attorneys for Petitioner.

APPENDIX A.

FINDINGS AND ORDER OF THE PUBLIC UTILITIES COMMISSION OF OHIO.

The Commission coming now to consider the above entitled application, the amended application, and the testimony and exhibits adduced at the public hearings, and being otherwise fully advised in the premises hereby renders its findings and order in compliance with the applicable statutes.

HISTORY OF THE PROCEEDINGS:

On April 27, 1961, the Cleveland Electric Illuminating Company filed with this Commission an application, with certain attached exhibits, seeking authority to increase the rates which it charges for steam and hot water service in the city of Cleveland, Ohio, by amending its filed schedule P. U. C. O. No. 6.

April 27, 1961. Motion filed by applicant requesting approval of a form of legal notice to be published.

May 9, 1961. Entry issued approving form of legal notice.

September 11, 1961. Petition to Intervene filed by the city of Cleveland.

September 20, 1961. Entry issued granting the Petition to Intervene.

March 5, 1962. The Commission's staff report of investigation filed and served as required by law.

April 4, 1962. Objections to the staff report of investigation filed by the city of Cleveland.

April 4, 1962. Objections to the staff report of investigation filed by Cleveland Electric Illuminating Company.

May 12, 1962. Exhibits and written testimony of applicant's witnesses filed.

May 22, 1962. Public hearings were held in this matter in the offices of the Commission on May 22, 23, 24, 25; June 19, 20, 21, 22; August 15, 16, 21, 22, 23, 24, 28, 29, 30, 31; September 11, 13, 14; October 23 and 24.

October 6, 1962. Motion filed by city of Cleveland to extend the time to complete its case.

October 10, 1962. Brief in opposition to the above motion filed by applicant.

October 11, 1962. Entry issued denying the motion.

October 17, 1962. Written testimony of city of Cleveland witnesses filed.

November 19, 1962. Brief filed by the city of Cleveland.

November 26, 1962. Reply brief filed by applicant.

December 7, 1962. Motion to reopen filed by applicant.

December 7, 1962. Entry issued reopening case and setting hearing for December 14, 1962.

December 13, 1962. Motion filed by the city of Cleveland for reconsideration of the Commission's order reopening the proceedings and for a change of the December 14, 1962 hearing date.

December 13, 1962. Motion filed by the city of Cleveland requesting correction of typographical errors in its motion filed December 13, 1962.

December 13, 1962. Motion to reopen filed on December 7th withdrawn.

December 13, 1962. Amendment to application filed by applicant.

APPEARANCES:

Messrs. Lee C. Howley, Vice President and General Counsel and Harry G. Fitzgerald, Jr., Counsel, 55 Public

Square, Cleveland 13, Ohio, on behalf of the Cleveland Electric Illuminating Company.

Squire, Sanders & Dempsey by Messrs. John Lansdale and Alan P. Buchmann, Counsel, 1857 Union Commerce Building, Cleveland 14, Ohio, on behalf of Cleveland Electric Illuminating Company.

Mayor Ralph S. Locher, Mr. Bronis J. Klementowicz, Director of Law, and Messrs. William T. McKnight and James L. Harkins, Jr., Assistant Directors of Law, 204 City Hall, Cleveland 14, Ohio, on behalf of the city of Cleveland and the Cleveland Public Library.

Honorable Mark McElroy, Attorney General, State of Ohio, by Messrs. Andrew R. Sarisky and Herbert T. Maher, Assistant Attorneys General, on behalf of the Public Utilities Commission of Ohio.

COMMISSION DISCUSSION:

AMENDMENT TO APPLICATION.

On December 13, 1962, the applicant filed with the Commission an amendment to its application. The amendment conforms the application to the terms of an agreement which was entered into between applicant and all of its steam customers except the city of Cleveland and the Cleveland Public Library.

The amendment withdraws a tax adjustment clause, earlier proposed, amends an earlier proposed fuel adjustment clause and requests approval of the following rates,

(a) Meter Rates

For the first 250,000 pounds per month per 1,000 pounds $1.575

For the next 250,000 pounds per month per 1,000 pounds $1.555

For the next 500,000 pounds per month per 1,000 pounds $1.535

For the next 2,000,000 pounds per month per 1,000 pounds $1.515

For all excess over 3,000,000 pounds per month per 1,000 pounds $1.50

(b) Flat Rate

"$1.155 per square foot of direct air radiating surface per heating season."

RATE BASE.

(a) Valuation.

The company and the Commission's engineering staff presented estimates of a statutory rate base as of June 30, 1960, the date certain, to be used for testing rates in this proceeding. The estimates are summarized as follows:

	Company	*Staff*
Reproduction Cost New	$26,671,115	$26,680,511
Less Depreciation		
(29.82%)	7,953,145	
(29.1%)		7,878,201
Reproduction Cost New Less Depreciation	$18,717,970	$18,802,310
Land and Land Rights	432,873	357,454
Work in Progress	4,566	4,566
Working Capital	697,000	37,111
Rate Base	$19,852,409	$19,201,441

The reproduction cost new valuation proposed by the company was arrived at by tabulating the historical cost for each class of property, taken from the records of the company, and applying to these costs trend factors or indices which were derived for the most part from the company's records of the year-by-year cost of the various types of property.

The Commission's engineers, being familiar with the company's cost-keeping methods and believing them to be reliable, accepted the tabulations of historical cost. After carefully considering the trend factors used by the company and checking them against other published trends, the Commission's engineers found them to be essentially similar to, if somewhat more conservative than, the other trends which have been accepted by this Commission in past cases. The staff engineers therefore found the reproduction cost new proposals of the company to be "within the zone of reasonableness and acceptable." In arriving at their own estimation of reproduction cost new valuation the staff engineers use essentially the same tabulations of costs and the same trend factors as can be readily seen from a comparison of the reproduction cost new valuations.

Many days of hearings were devoted to testimony with respect to the reproduction cost new valuation. During the course of the cross-examination of company witnesses it was disclosed that a substantial amount of mains had been classified as wood casing mains when they were in fact channel tile and concrete tunnel mains. Reclassification of these mains into the proper accounts has the effect of lowering the reproduction cost new estimate of the company by approximately $325,000 and the estimate of the staff by approximately $353,000. This reclassification, of course, affects the estimates of depreciation as well, since different depreciation percentages apply to the different classifications of mains. The effect on depreciation is discussed under (b) Depreciation.

Except for the error discussed above, the testimony of the company and staff witnesses bore out in detail the reproduction cost new valuations submitted.

The Commission's staff used the book cost of $357,454

in valuing land and land rights. The company submitted an estimate of $432,873 as the value of the land on the date certain. A real estate expert employed by the company testified in support of the latter valuation. The Commission is of the opinion that $432,873 is a reasonable estimate of such value for the purposes of this proceeding.

As is noted above, both the estimates contain the amount of $4,566 for work in progress. This represents property which was in service on the date certain but which had not been closed to the property account records of the company. The Commission finds this inclusion reasonable.

In its estimate of reproduction cost new the company deducted from its various accounts an amount for a so-called "single impulse" adjustment. The engineering staff of the Commission found the amount of the adjustments made by the company to be reasonable and deducted the sum of these adjustments to arrive at its estimate.

(b) Depreciation.

The company's estimate of loss of value due to depreciation was reached by its consulting engineer by means of visual observations of the property. Very few inspections of mains were made prior to the filing of the application. Because of the relatively few number of inspections, the company raised its estimates. Further observations were made after the application which indicated to the witness that his preliminary estimates of loss of value due to depreciation were high. After arriving at its estimates of depreciation to the various classes of property by visual inspection the company made a "special deduction" for excess steam losses in the amount of $772,240.

The reclassification of the mains referred to in the previous section resulted in a decrease in the company's

estimate of depreciation of approximately $375,000. The decrease in depreciation is greater than the decrease in reproduction cost new valuation because the dollars were transferred from wood casing which is older property with a greater amount of depreciation to channel tile and concrete tunnel which is newer property with less depreciation.

The Commission's staff engineers arrived at their estimate of loss of value due to depreciation by means of a field study consisting of a visual inspection of the property and an "office" or actuarial study. The office study consisted of age-life analyses by property accounts. The average service life and the average expired life were estimated for the property in each account. The ratios of expired life to average service were then applied to depreciation curves. Each of these curves is derived from property mortality data and represents the loci of points, each of which shows the percentage of depreciation associated with a given percentage of expired life. Thus, once the type of curve appropriate to the particular account is selected and the ratio of expired life to average service life is determined for the property in the account, the percentage of depreciation is simply the point on the vertical axis corresponding to the point on the curve given by the ratio of expired life to average service life. In this way a percentage of depreciation was estimated for each property account. The results of the office study and the field study were then averaged by accounts to arrive at the staff's final estimate of depreciation.

The reclassification of the mains referred to above resulted in a decrease in the staff's estimate of depreciation of approximately $175,000. The decrease in depreciation estimated by the staff is less than the decrease in the staff's reproduction cost new valuation of mains because the dif-

ference between the percent of depreciation of the newer channel tile and concrete tunnel property and the percent of depreciation assigned to wood casing in the staff's estimate is not as great as it was in the company's estimate.

The Commission has carefully considered the methods and procedures used by the company's witness and by the staff engineers in estimating the depreciation of the property. In the opinion of the Commission, depreciation cannot be determined accurately by visual inspection alone. In this case both the company and the staff engineers gave weight to factors other than those observable by a visual inspection. The company's estimate of percent depreciation is 28.3 percent. The staff's estimate is 28.79 percent. The estimates are so close that a choice between the two makes no great difference in the end result. The members of the Commission themselves differ on what is the best method of estimating percent depreciation. For the purpose of this proceeding, the Commission will use the higher estimate of 28.79 percent depreciation to arrive at a rate base on which to test the reasonableness of the existing and the proposed rates. The use of the lower percent depreciation would result in showing a slightly higher rate base and therefore a slightly lower rate of return at both rate levels.

(c) Working Capital.

The company submitted an estimate of $679,000 for gross working capital. This was based upon a cash requirement of one-eighth of the annual expenses of operation and maintenance, plus the value of materials and supplies on hand calculated on the average month-end balance for the twelve months of 1960, and plus the estimated cost of fuel to be kept on hand. The staff engineers agreed with the company as to the amount of cash re-

quirements and value of materials and supplies, but reduced the amount for fuel to be kept on hand because the estimate of the company exceeded the maximum amount of coal which could be stored at the limited facilities used for this purpose at the steam generating plants. The Commission finds the adjustment made by the staff engineers to be reasonable. As adjusted by the staff, the allowable gross working capital is $530,359. From this should be deducted 50 percent of all tax expense which represents tax accruals available for use as working capital. At present rates the total tax expense is $525,814. Deducting 50 percent of this, or $262,907 from the gross working capital of $530,359 leaves a net working capital of $267,454.

Since it is clear that the net allowance for working capital depends on the amount deducted to reflect cash available from tax accruals, and the latter in turn depends on taxable income which will increase with an increase in revenues, it follows that a determination by the Commission to increase revenues by increasing the rates of applicant will necessitate recalculating the net working capital with a resultant change in the rate base, as will be explained hereafter in the discussion of the company's proposed rates.

(d) Summary.

The estimates of rate base valuation submitted by the company and by the staff, after the adjustments noted above, may be summarized as follows:

	Company	*Staff*
Total Depreciable Property	$26,346,612	$26,327,649
Land and Land Rights	432,873	432,873
Work in Progress	4,566	4,566
Reproduction Cost New	$26,784,051	$26,765,088
Less Depreciation (28.3%)	7,580,585	
(28.79%)		7,706,409
Reproduction Cost New Less Depreciation	$19,203,466	$19,058,679
Working Capital	697,000	267,452*
Statutory Rate Base	$19,900,466	$19,326,131*

In consideration of the foregoing and after consideration of all the probative evidence of record in these proceedings, the Commission is of the opinion and finds that $19,326,131* is a reasonable estimate of the statutory rate base valuation of the property of the applicant used and useful in the rendition of the utility service under consideration for purposes of these proceedings.

REVENUES, EXPENSES AND RETURN AT PRESENT RATES.

Column 1 of the accounting schedule No. 1 of the staff report sets forth revenues, expenses and return at present rates for the year ended December 31, 1960, as shown on the applicant's books. The accounting staff made adjustments to the expenses as follows:

(a) An increase of $5,869.00 for wage increases granted during the test period, annualized,

(b) A decrease in depreciation expense, in the amount of $17,036.00, to account for the difference

* Subject to recalculation upon any allowed increase in revenue.

between the amount determined to be appropriate by the engineers of this Commission and the amount accrued on the company's books of record, and

(c) A decrease of $3,839.88 for federal income taxes as a result of the above adjustments.

The revenues, expenses and return after the adjustments may then be summarized as follows:

Operating Revenues	$3,764,542.60
Operating Expenses	$2,358,375.00
Depreciation	315,964.00
Taxes, other than federal income	357,510.00
Federal Income Taxes	168,303.07
Total Expenses	$3,200,152.07
Return	$ 564,390.53

The return of $564,390.53 represents a rate of return of 2.92 percent at present rates, based upon the statutory rate base of $19,326,131 found by the Commission above.

The Commission finds that such a rate of return is insufficient to provide applicant with reasonable compensation for the utility service rendered by it, having due regard for the depreciated reproduction value of its property devoted to the rendition of such service.

REVENUES, EXPENSES AND RETURN AT PROPOSED RATES

The revenues, expenses and return at the company's proposed rates would result in additional revenue in the amount of $259,425.59. The Commission is of the opinion that expenses would have to be further increased in the amount of $13,854 to reflect the estimated rate case expense of $69,268.00 amortized over a five-year period. With the adjustments for additional gross revenues, in-

creased expenses, and subsequent adjustments in taxes, the revenues, expenses and return at proposed rates may then be summarized as follows:

Operating Revenues	$4,023,968.19
Operating Expenses	$2,372,229.00
Depreciation	315,964.00
Taxes, other than federal income	361,580.38
Federal Income Tax	293,883.70
Total Expenses	$3,343,657.08
Return	$ 680,311.11

As stated above, it will first be necessary to recalculate the rate base since the net allowance for working capital depends on the amount deducted for cash available from tax accruals and the latter depends on taxable income which, in turn, is a function of revenue. At the higher rates authorized in this proceeding, tax accruals would be increased to $655,464.08. Allowable net working capital at increased rates is, therefore, $202,627, computed as follows:

Cash Working Capital	$294,797
Materials and Supplies	115,562
Fuel	120,000
Gross Working Capital	$530,359
Less: 50% of Tax Accruals	327,732
Net Working Capital	$202,627

Adding the net working capital of $202,627 to the reproduction cost new less depreciation of $19,058,679 results in a rate base valuation of $19,261,306.

The return of $680,311.11 represents a rate of return

of 3.53 percent on the above-determined rate base of $19,261,306.

RATE OF RETURN.

Applicant presented two witnesses on rate of return in this proceeding. Witness Brooks estimated that the fair rate of return would be not less than 6.5 percent. Witness Cook estimated that it would be at least 6.66 percent. In spite of this testimony, the company is seeking rates which result in a return which is substantially less, in fact almost 50 percent less than the rate recommended by Witness Cook.

The city's rate of return witness, Mr. Honaker, did not specifically recommend a fair rate of return on the reproduction cost new less depreciation rate base. He recommended instead a "maximum fair earnings permissible" to the company of $525,000 which was based upon a return of 8 percent on invested capital and 13 percent on invested common stock equity capital. In support of these percentages he set forth the percentages earned by the company on these items for the years 1957 through 1960. Mr. Harkins, the city's other rate of return witness, also urged the fairness of 13 percent rate on invested common stock equity. To the extent that the supporting data is meaningful at all, applying, as it does, to investment rather than to the statutory reconstruction cost new less depreciation rate base, Mr. Honaker's data is too narrow to serve as a criterion encompassing only the company under consideration. Mr. Harkins' data is too wide, on the other hand, encompassing many companies and enterprises not at all similar to the company under consideration in size, in character of business, in capital structure, in stability or in any other way. Moreover, while a comparison of the actual return on common stock equity and

invested capital with acceptable levels of earnings of comparable companies could be a useful means of testing the fairness of any given rate of return on the rate base as required by Ohio Court decisions, the decisions have held that the actual earnings requirements of a company "are not really material in a proceeding of this kind." The fair rate of return is a figure which must be determined under Ohio law on the reproduction cost new less depreciation rate base, in the light of all of the facts and circumstances of this case, the rate of return of 3.53 percent resulting from application of the proposed rates to the statutory rate base cannot be considered unjust or unreasonable. The Commission does not decide or attempt to decide whether the rate of return is unjust or unreasonable by any other criteria than those limited few criteria supplied to it by court interpretations of the meaning of the statutes.

ADJUSTMENT CLAUSES.

In an amendment to its application, the company withdrew its proposed tax adjustment clause to which the city of Cleveland had objected.

The company proposed to amend its existing fuel adjustment clause so that for each increase or decrease of 10 cents in coal cost above or below $6.00 per ton the rates increase or decrease:

> "Meter rate: Seven-tenths (7/10) of one cent for each 1,000 pounds of condensation.
>
> "Flat rate: One-half (½) of one cent per square foot of direct air radiating surface per heating season."

The existing fuel cost adjustment rates are higher. The Commission is of the opinion that the proposed amendment to the fuel adjustment clause is reasonable

and should be approved. There remains to be discussed several questions raised by counsel for the city of Cleveland.

First, counsel for the city of Cleveland urges that the application be dismissed "as a matter of comity and equity," charging that the city was not notified in advance of the company's intention to seek an increase in steam rates. There is no obligation on the company under the statutes to give notice prior to filing for a rate increase, and the Commission is without equity power to consider whether good faith required such notice to be given.

Second, counsel for the city of Cleveland urged that steam operations of the company should be considered with electric operations also engaged in by the company, charging an abuse of public trust on the part of the company in failing to bring its combined operations before the Commission as a "package deal."

Section 4909.18 of the Revised Code, dealing with applications to fix rates, requires

> "If such application is for an increase in any rate * * * there shall also be filed * * * a detailed inventory and appraisal of its property used and useful in rendering *the service referred to* in such application * * *."

The application was for an increase in steam rates. The inventory and appraisal therefore properly covered only the property used and useful in rendering steam service. The level of rates is tested upon a rate base consisting of a valuation of steam service properties, including properties allocated partly to use in rendering steam service. Counsel's contention that steam operations should not be considered as a separate entity must therefore be rejected as contrary to law. The Commission further remarks that

to consider the two types of operations together as an entity in order to determine an allowable level of earnings for the over-all company would not obviate the necessity of determining the fair proportion of earnings to be received from any class or type of service in order to avoid unjust discrimination among customers. It appears in this case that for various reasons, principally having to do with competition by other fuels for the heating business, the company is willing to seek a lower return on its property from steam customers than it would seek from electric customers. To apply the contention of counsel for the city of Cleveland to an application by the same company for an increase in electric rates based on over-all operations of the company, including steam operations, would result in higher electric rates than could otherwise be justified on the basis of electric operation alone because the company would recover in electric rates what it failed to seek or failed to recover in steam rates, rather than assume for itself the burden of lower steam rates.

Third, counsel for the city of Cleveland contends the city was denied procedural due process of law, charging the city was severely limited as to time in its cross-examination. The Commission is as aware as counsel of the complexity of the issues raised in rate case proceedings where the valuation of a single item, even the estimated depreciation of the item, is based on judgment. In civil suits days are consumed in valuations of single items which are more rather than less susceptible to exact appraisal. In fact, however, the doubts of the exactness of valuations under a valuation rate base law can never be altogether resolved, nor can differences of opinion be altogether resolved on questions of policy and of bases of judgment going into the construction of rates and rules.

The direct testimony of the company's witnesses con-

sumed approximately four days. Cross-examination consumed approximately 17 days. The Commission is of the opinion that the time allowed was adequate and the thoroughness of the cross-examination will demonstrate the full scope afforded to counsel.

Fourth, counsel urges that the Fourteenth Amendment to the United States Constitution with regard to due process and equal protection of the laws are violated by the laws of Ohio. Since the Commission is not empowered to pass on the constitutionality of statutes it is given to administer, the Commission does not attempt to decide the issue in its various ramifications.

ULTIMATE FINDINGS:

From the evidence adduced upon the record, the Commission renders the following ultimate findings:

(1) The application is filed pursuant to and this Commission has jurisdiction thereof under the provisions of sections 4909.17, 4909.18 and 4909.19 of the Revised Code;

(2) The investigation required under section 4909.19 of the Revised Code has been filed and served as required;

(3) The applicant's statutory rate base for purposes of this proceeding is $19,261,306;

(4) The existing rates now being charged and collected by the applicant are insufficient to provide it with an adequate return on its plant and property used and useful in the furnishing of its service;

(5) The fair annual return of 3.53 percent at proposed rates is not unreasonable or unjust;

(6) The dollar annual return to which applicant is entitled for purposes of this proceeding is $680,-311.11;

(7) That the allowable expenses of applicant for purposes of this proceeding, including operating expenses, taxes and depreciation, aggregate $3,343,-657.08;

(8) That the allowable annual revenue to which applicant is entitled for purposes of this proceeding is $4,023,968.19; and

(9) That the fuel adjustment clause as amended is reasonable and should be allowed.

ORDER:

It is, therefore

ORDERED, that in accordance with the findings and opinion herein set forth, the applicant, Cleveland Electric Illuminating Company, be and hereby is authorized to file with this Commission adjusted tariff schedules in accordance with those set forth in its application as amended. It is, further

ORDERED, that such tariff schedules may become effective on the first billing date subsequent to the filing of such tariff schedules.

THE PUBLIC UTILITIES COMMISSION OF OHIO
FRANCES MCGOVERN,
Chairman,
RICHARD C. ADDISON,
DALE FULTON,
Commissioners.

APPENDIX B.

OPINION OF THE SUPREME COURT OF OHIO.

Public utilities—Steam and hot-water service—Rates determined, how—Finding of Public Utilities Commission not disturbed, when—Valuation of property—Effective date of increased rates.

(No. 38692—Decided July 7, 1965.)

APPEAL from the Public Utilities Commission.

On April 27, 1961, appellee The Cleveland Electric Illuminating Company applied to the Public Utilities Commission of Ohio for authority to raise its rates for steam and hot-water service supplied to users in the city of Cleveland.

After hearing, the commission, on January 8, 1963, found that the existing rates being charged are insufficient to provide the company with an adequate return; that the statutory rate base is $19,261,306; that an annual return of 3.53% is not unreasonable or unjust; that the annual dollar return to which the company is entitled is $680,311.11; that the allowable annual expenses aggregate $3,343,657.08; that the allowable annual revenue to which applicant is entitled is $4,023,968.19; and that the amendment to the fuel adjustment clause of the application was reasonable.

After a rate increase was granted, a motion for rehearing was filed by the city of Cleveland and was denied by the commission.

The case is before this court upon appeal from the order of the Public Utilities Commission granting the requested increase in rates.

Mr. Bronis J. Klementowicz, director of law, *Mr. William T. McKnight* and *Mr. James L. Harkins, Jr.,* for appellant.

Mr. William B. Saxbe, attorney general, *Mr. Jay C. Flowers* and *Mr. Theodore K. High*, for appellee Public Utilities Commission.

Mr. Lee C. Howley, Mr. Harry G. Fitzgerald, Jr., Messrs. Squire, Sanders & Dempsey, Mr. John Lansdale and Mr. Alan P. Buchmann, for appellee The Cleveland Electric Illuminating Company.

Per Curiam. Appellant assigned 55 errors but reduced these assigned errors to four questions to be decided by this court. The four questions are as follows:

1. Has the commission fixed excessive rates which have confiscated the property of appellant and its ratepayers?

2. May the commission utilize published trend factors to aid in valuation of property for the determination of the statutory rate base of the company's property?

3. Is the company's coal escalation clause an unconstitutional delegation by the commission of its power to set rates?

4. Is the commission's order allowing the rate increase retroactive and, therefore, unlawful and unreasonable?

With regard to the first question, the city grounds its case upon its argument that the net return to the company should be based upon "total capitalization" or "net investment."

This argument has been repeatedly rejected by this court because it is in conflict with the rate base formula provided by statute in Ohio, which is reproduction cost new less depreciation.

In *City of Cleveland v. Public Utilities Commission* (1956), 164 Ohio St. 442, 444, this court said:

> "* * * under the Ohio statutes and the decisions of this court, the percentage return is to be related not to the 'total capitalization' or to the 'net investment' but to the statutory rate base (reconstruction cost new less depreciation) so that *neither the actual capital of or net investment in this public utility * * * are really material * * *.*" See *General Telephone Co. v. Public Utilities Commission* (1963), 174 Ohio St. 575, 577; *East Ohio Gas Co. v. Public Utilities Commission* (1938), 133 Ohio St. 212, 218.

There is evidence in the record to support a much higher rate of return than that asked by the company. A finding and order by the commission will not be disturbed unless it appears from the record that such finding and order are manifestly against the weight of the evidence and are so clearly unsupported by the record as to show misapprehension or mistake or willful disregard of duty. *City of Delphos v. Public Utilities Commission* (1940), 137 Ohio St. 422, 428; *East Ohio Gas Co. v. Public Utilities Commission* (1940), 137 Ohio St. 225.

The second proposition raised by the appellant is that a valuation based upon published trend factors, *i.e.*, Handy Whitman and Marshall-Stevens indices, does not conform to Section 4909.05(D), Revised Code, which requires a showing of "values of the separate items comprising such property, together with the unit basis of such valuation."

This Court has previously decided this question in *Lindsey v. Public Utilities Commission* (1924), 111 Ohio St. 6; *Ohio Bell Telephone Co. v. Public Utilities Commission* (1936), 131 Ohio St. 539, 583 (reversed on other grounds, 301 U. S. 292); *Cincinnati Gas & Electric Co. v. Public Utilities Commission* (1962), 173 Ohio St. 473; *City of Dayton v. Public Utilities Commission* (1962), 174

Ohio St. 160 (reversed on other grounds on rehearing [1963], 174 Ohio St. 604).

In its argument on the third question raised, the appellant objects to the company's coal escalation clause on the grounds that the company's present coal escalation clause has not been effective at any time during its existence, that the company has considered such a clause as a means of rate relief and that in accepting it the commission is abdicating its rate-making responsibility.

There is no evidence in the record of any past abuses of customers' rights under this clause, which would indicate that the finding of the commission is unreasonable or unlawful on this ground.

For its fourth proposition appellant asserts that the rates set by the commission were applied retroactively, since they were ordered by the commission to become effective on the first billing date subsequent to the filing of such adjusted tariff schedules, and the company by its billings charged customers at the increased rates from the date of the last billings rather than from the date on which the adjusted tariff schedules were filed.

This matter of the date on which the rate increase was first charged to the customer is a matter between the customer and the company which will not be considered by this court in this appeal from an application of the company to the Public Utilities Commission for an increase in its rates and charges.

On the record, this court can not find that the decision of the commission is unlawful or unreasonable.

The order of the Public Utilities Commission is, therefore, affirmed.

Order affirmed.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL, HERBERT, SCHNEIDER and BROWN, JJ., concur.

APPENDIX C.

Journal Entries of the Supreme Court of Ohio.

July 7, 1965:

This cause, here on appeal from the Public Utilities Commission, was heard in the manner prescribed by law. On consideration thereof, the order of the Commission is affirmed for the reasons stated in the opinion herein.

August 19, 1965:

It is ordered by the Court that rehearing in this case is denied.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 1 51965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 742.

CITY OF CLEVELAND, OHIO,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO,

and

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Respondents.

BRIEF OF RESPONDENT, THE PUBLIC UTILITIES COMMISSION OF OHIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

WILLIAM B. SAXBE,
Attorney General of Ohio,
State House Annex,
Columbus, Ohio 43215,

THEODORE K. HIGH,
Assistant Attorney General,
111 North High Street,
Columbus, Ohio 43215,
Counsel for Respondent,
Public Utilities Commission of Ohio.

December 15, 1965.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

INDEX.

Statement 1

Argument 2

Appendix A. Notice of Appeal, Case No. 30,109 Before the Public Utilities Commission of Ohio, Appeal No. 38,692 in the Supreme Court of Ohio 8

TABLE OF AUTHORITIES.

Cases.

Akron, City of, v. Chapman, 160 Ohio St. 382 3

Browne v. Union Pacific Railroad, 267 U. S. 255, 69 L. ed. 601 6

Cleveland, Ohio, City of, v. Public Utilities Commission of Ohio, 3 Ohio St. 2d 82 1

Department of Mental Hygiene of California v. Kirchner, 380 U. S. 194, 13 L. ed. 753, 85 Sup. Ct. 871 6

Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 252 U. S. 341, 64 L. ed. 601 6

Lynch v. New York, 293 U. S. 52, 79 L. ed. 195 6

Neblett v. Carpenter, 305 U. S. 297, 83 L. ed. 182, 59 S. Ct. 170, reh. den. 305 U. S. 675, 83 L. ed. 437, 59 S. Ct. 335 6

Southwestern Bell Telephone Co. v. Oklahoma, 303 U. S. 206 6

Thomas v. State of Iowa, 209 U. S. 258 5

White River Lumber Co. v. Arkansas, 279 U. S. 692, 73 L. ed. 903 6

Statutes.

Ohio Revised Code, Section 4905.26 5

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 742.

CITY OF CLEVELAND, OHIO,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO,

and

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Respondents.

BRIEF OF RESPONDENT, THE PUBLIC UTILITIES COMMISSION OF OHIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

STATEMENT.

This Brief is filed in opposition to the Petition for Writ of Certiorari to the Supreme Court of Ohio of the City of Cleveland, Ohio, whereby that city petitions this Court to review the decision of the Supreme Court of Ohio in *City of Cleveland, Ohio, v. Public Utilities Commission of Ohio,* 3 Ohio St. 2d 82. It shall be the purpose of this Brief to demonstrate that no federal question was before the Supreme Court of Ohio, and none was decided. As a consequence the Petition is without merit, raises no basis upon which to invoke this Court's jurisdiction, and should be dismissed.

ARGUMENT.

The Petition for Writ of Certiorari (hereinafter called "the Petition") should be dismissed because the City of Cleveland did not raise, and the Supreme Court of Ohio (hereinafter sometimes called the Ohio Court) did not decide, any federal question. Therefore, there is no federal question that would be before this Court if the Petition were granted.

The questions considered may be seen from the opinion of the Supreme Court of Ohio, set out as Appendix "B" (pp. 36, 37, 38, and 39) of the Petition for Writ of Certiorari herein. The Supreme Court of Ohio begins its opinion by observing (at p. 37 of the Petition) that the Appellant (your Petitioner here) assigned 55 errors, but reduced those assigned errors to four questions to be decided by that Court.

In its jurisdictional statement and in the Statement of Questions Presented, the Petition indicates that any federal question presented would be based upon the Fourteenth Amendment to the Constitution of the United States and, at page 10, asserts that this federal question was raised in its Notice of Appeal of April 30, 1963, to the Supreme Court of Ohio. For the convenience of the Court, the Notice of Appeal to the Supreme Court of Ohio containing the Appellant's (your Petitioner here) original 55 assignments of error is appended hereto as Appendix "A." The Court will notice that only assignments of error 8, 27, and 50 allege anything that could even vaguely be considered constitutional questions. At no place is the Federal Constitution (to say nothing of any particular provision thereof) mentioned. Assignment 50 alleges an "unconstitutional" application of the rate-making formula, without specifying which constitution or which provision thereof.

Assignments 8 and 27 refer merely to "due process of law," again without referring to any constitution. Assuming one could narrow the search to the Federal and Ohio Constitutions (a somewhat dubious assumption since there is no reference to constitutionality), a problem would be presented in that the Ohio Constitution, as well as the Federal Constitution, provides for "due process of law." *City of Akron v. Chapman,* 160 Ohio St. 382, 385. It was only as an apparent afterthought that the then appellant urged the Fourteenth Amendment of the Federal Constitution as protection against alleged confiscation of ratepayer's property. It is understandable that, with the Federal Constitution sought to be raised only at that late date, the Supreme Court of Ohio ignored that contention in setting out the four questions to be decided (see particularly question one) to which the Appellant had reduced its 55 assignments of error (see the Petition, page 37).

The Ohio Court's disposition of the first question may be seen on pages 37 and 38 of the Petition. Clearly, the Ohio Court—in the highly unlikely event that it felt that there was a constitutional question in fact raised by question one—did not reach any constitutional question. Instead, that Court found that the Commission's decision was not only supported by the evidence, but that (at page 38 of the Petition) "[t]here is evidence in the record to support a much higher rate of return than that asked by the company."

The second question obviously requests the Ohio Court to determine whether *under Ohio law* the Commission could utilize published trend factors to aid in the valuation of public utility plant and property. The City of Cleveland apparently recognizing this, has not included it among its Questions Presented in the instant Petition.

Question three (question two in the Questions Presented in the instant Petition) does, in fact, allege that the Commission's approval of a coal escalation clause was an "unconstitutional delegation" of its power. Again, the Appellant did not specify which constitution, or which provision of that unspecified constitution, the Appellant felt had been violated. If one were willing to speculate on the subject, it would seem more reasonable to conjecture that the Ohio Constitution was the one sought to be invoked, since the Commission's powers and responsibilities derive from the Ohio General Assembly and the Ohio General Assembly's powers are enumerated in the Constitution of Ohio. The Ohio Court found that there was no evidence in the record to demonstrate that the approval of such a clause was unreasonable or unlawful (page 39 of the Petition). It is manifest from the discussion of question three at page 39 of the Petition that the Ohio Court did not feel that a federal constitutional question was before it and did not purport to decide one.

Question four (question three of the Questions Presented in the Petition) does not raise a federal question and does not even purport to. The allegation that the Commission's Order with regard to the effective date of the rate increase is "unlawful and unreasonable" implies more that it is unlawful with reference to the statutes providing for the setting of rates by the Commission and an abuse of the discretion provided by those statutes, than to any constitution. The Ohio Court's answer to question four before it is that it is not a proper one to be raised in an appeal of a rate case. In holding that the question of the date upon which the rate is first charged is a matter between the customer and the company, the Court obviously (even apart from a consideration of whether the

City of Cleveland, except insofar as it may itself be a customer, is not the proper party to raise the question) had in mind that any customer who could not resolve his dispute as to the effective date with the company had available the complaint procedure, provided by Section 4905.26, Ohio Revised Code, with the Commission. In short, the Ohio Court quite properly felt it was being called upon to review the Commission's Order in the light of Ohio statutes, not the Federal Constitution, and did not purport to decide any federal question, since question four raised none.

From the foregoing it is clear that there was no federal question before the Ohio Court and that it decided none.

The Ohio Court was quite proper in considering that there was no federal question before it. The two vague references to "due process of law" are not sufficient to raise one. Thus, this Court held in *Thomas v. State of Iowa*, 209 U. S. 258, at page 263:

> "* * * A mere claim in the court below that there has been a denial of due process of law does not of itself raise a federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the 14th Amendment of the Constitution. See Clarke v. McDade, 165 U. S. 168, 172, 41 L. ed. 673, 17 Sup. Ct. Rep. 284; Miller v. Cornwall R. Co., 168 U. S. 131, 134, 42 L. ed. 409, 410, 18 Sup. Ct. Rep. 34; Harding v. Illinois, 196 U. S. 78, 88, 49 L. ed. 394, 397, 25 Sup. Ct. Rep. 176."

Indeed, none of the three vague references to the "due process" and "constitutionality" in the Notice of Appeal refers to the Federal Constitution or any other federal question. It is too late to raise the federal question for the first time in a petition for writ of certiorari, since the record before the state court must show that the federal

question was affirmatively raised there. *White River Lumber Co. v. Arkansas,* 279 U. S. 692, 700, 73 L. ed. 903; *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.,* 252 U. S. 341, 64 L. ed. 601. It must affirmatively appear from the record not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the case, *Southwestern Bell Telephone Co. v. Oklahoma,* 303 U. S. 206, 212-213. Thus, had the Ohio Court's decision been based upon two grounds, one involving a federal question and one not, this Court has held that, where the ground independent of the federal question is sufficient to sustain the judgment, this Court will not take jurisdiction on certiorari, *Lynch v. New York,* 293 U. S. 52, 79 L. ed. 195; *Browne v. Union Pacific Railroad,* 267 U. S. 255, 69 L. ed. 601. In fact, this Court recently held that a federal ground had to be the *sole* basis for decision of the state court. *Department of Mental Hygiene of California v. Kirchner,* 380 U. S. 194, 13 L. ed. 753, 757-758, 85 Sup. Ct. 871, 874.

Here, of course, the Ohio Court has decided the case *solely* on the basis of *state law* and this Court has held that it is without jurisdiction on certiorari to review holdings of state courts which concern matters of state law. *Neblett v. Carpenter,* 305 U. S. 297, 83 L. ed. 182, 59 S. Ct. 170, reh. den. 305 U. S. 675, 83 L. ed. 437, 59 S. Ct. 335.

For all of the foregoing reasons, it is respectfully submitted that the Petition presents no basis upon which to invoke this Court's jurisdiction on certiorari and should be dismissed.

Respectfully submitted,

WILLIAM B. SAXBE,
Attorney General of Ohio,
State House Annex,
Columbus, Ohio 43215,

THEODORE K. HIGH,
Assistant Attorney General,
111 North High Street,
Columbus, Ohio 43215,
Counsel for Respondent,
Public Utilities Commission of Ohio.

December 15, 1965.

APPENDIX A.

NOTICE OF APPEAL, CASE NO. 30,109 BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO, APPEAL NO. 38,692 IN THE SUPREME COURT OF OHIO.

IN THE SUPREME COURT OF OHIO.

IN THE MATTER OF THE APPLICATION OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY FOR AUTHORITY TO AMEND AND TO INCREASE ITS FILED SCHEDULE FIXING RATES AND CHARGES FOR STEAM AND HOT WATER SERVICE IN THE CITY OF CLEVELAND, OHIO.

NOTICE OF APPEAL.

Notice is hereby given by the City of Cleveland, Ohio, (Cleveland) of its intention to appeal from the order of the Public Utilities Commission of Ohio rendered on March 5, 1963, denying to Cleveland a reopening, rehearing, and reconsideration of the order of said Commission of January 8, 1963, in the above captioned matter.

Cleveland prosecutes this appeal as both a ratepayer and a representative of the applicant's ratepayers.

Cleveland submits that the action of the Public Utilities Commission of Ohio (Commission) in denying Cleveland's application of February 6, 1963, for a reopening, rehearing, and reconsideration of its order of January 8, 1963, is unreasonable, unlawful, erroneous and unconstitutional for the following stated reasons:

1. That the applicant did not disclose its intent to file for an increase in steam rates during its last rate negotiations with the City of Cleveland.

2. That the applicant had a duty to make such disclosure.

3. That the applicant in filing for increased steam rates violated its duty of full disclosure to the City of Cleveland.

4. That said violation of duty necessitates the dismissal of this application as a matter of comity and equity.

5. That the applicant's steam operations should not be considered as a separate entity from its electric operations.

6. That the requirements laid down in Section 4909.18 of the Revised Code of a detailed inventory do not require the commission to allow this division of services which is contrary to both economics and reason.

7. That the only legal rates for steam services between January 1, 1954, and January 8, 1963, were those that were established by order of the Commission issued under date of October 9, 1953 in Proceeding No. 24175.

8. That to permit the applicant to charge its customers for services that were rendered entirely before January 8, 1963, on the basis of the rates set on January 8, 1963, is to confiscate their property in violation of due process of law.

9. That in view of the small number of steam customers it would have been a very minor undertaking for the applicant to have read all of the meters of said customers on such date as the new rates became effective in order to render legal charges.

10. That there was no reason for the Commission to confer such unusual billing privileges upon the applicant.

11. That the applicant's coal escalation formulae during a history of over forty years have never resulted in revenue adjustments that were in reasonable balance with changes in the cost of coal (Tr. 743 and 744).

12. That from 1950 through 1962 the applicant's coal escalation formula has caused revenue changes that were consistently 40% greater than changes in the cost of coal (Tr. 687-8).

13. That the Commission denied a motion to investigate into the overcharges for increased coal costs by the applicant to its customers arising by virtue of the provisions of its coal escalation formula.

14. That although the revised coal escalation formula is more accurate than its predecessor, there is insufficient evidence as to whether said revised formula is accurate within acceptable limits.

15. That escalation of coal costs would require that the applicant's books be continuously audited which imposes an undue burden upon the applicant's customers and a responsibility upon the Commission which it has demonstrably been unable to assume.

16. That the practical result of the approval of the escalation of the applicant's coal costs is an abdication of responsibility by the Commission in the face of both a past history of gross abuses and grave possibilities of mischief by the applicant.

17. That the applicant's control over the cost of its coal through its interest in coal producing properties is an invitation to extreme mischief.

18. That the applicant's formula is vague and dependent upon its operating policies which have not been made a matter of record.

19. That the escalation of coal costs deprives the applicant's customers of certainty as to their charges.

20. That the applicant's formula does not provide for increases in combustion efficiencies with corresponding fuel economies.

21. That the applicant views its coal escalation formula as a source of general rate relief rather than as a means for adjusting rates to account for changes in coal costs.

22. That it is highly prejudicial to the applicant's customers to grant the applicant the power to change its rates in view of the applicant's distorted views in regard to the purposes and uses of cost escalation formulae.

23. That neither the Commission nor the applicant have valued the cost of new production of the applicant's property in the detail as required by Ohio law.

24. That the depreciation from the new reproductive cost was consequently not in the detail as required by Ohio law.

25. That neither the Commission and its staff nor the applicant have submitted proof as to the percentage and amount of each class of depreciation as required by Ohio law, and that the depreciation disclosed by the evidence was far higher for each class of depreciable property than that subsequently found by the Commission.

26. That the failure by both the Commission and the applicant to itemize and value the property in question in accordance with Ohio law unreasonably handicapped the City of Cleveland in both the cross

examination of the Staff of the Commission and the applicant's witnesses as well as in the development of the City's case in chief.

27. That Cleveland was denied procedural due process of law by the strict time limitation of only five and one-half days in which to complete the greater part of its cross examination, and the failure to grant Cleveland's motion for an opportunity to audit the applicant's records.

28. That in spite of the severe limitations placed upon Cleveland by the Commission, Cleveland was able to demonstrate conclusively that there were huge inefficiencies in construction for all the major classifications of depreciable property not accounted for by either the applicant or the Staff of the Commission, and that consequently all trended valuation were invalid.

29. That the valuations developed by the Staff of the Commission are dependent upon trends which are applicable to such enormous areas that said trends cannot be expected to be applicable within reasonable limits of accuracy to a much smaller area like Ohio in general and to a still smaller area like Cleveland in particular.

30. That the statutory valuation for boiler plant structures should have been no higher than $2,457,-600.

31. That the statutory valuation for boiler plant equipment should have been no higher than $3,895,-600.

32. That the statutory valuation for mains should have been no higher than $2,784,600.

33. That excess steam losses should be treated as an adjustment to income rather than as an item of depreciation.

34. That excess steam losses were understated.

35. That even if the capitalization of steam losses adopted by the applicant and approved by the Commission were correct in theory, that it was incorrect in application since the inclusion of depreciation as a capitalizable item means that the applicant seeks reimbursement for the same depreciation through an increase in its rate base as well as an expense.

36. That the rate of return assumed for the purpose of capitalizing excess steam losses has been shown to be excessive by both evidence introduced by Cleveland and the decision of the Commission.

37. That the cost of taxes assumed for the purpose of capitalizing excess steam losses is excessive in view of the lower rate of return found to be reasonable and the fact that no consideration was given to the applicant's average effective tax rates.

38. That the applicant's maintenance expenses were excessive.

39. That the cost of depreciation both found by the Commission and advocated by the applicant evinces a much higher rate of depreciation than that which would be a consequence of either the valuation studies of the Staff of the Commission or the applicant's valuation studies.

40. That there is no evidence as to the agreement alleged by the Commission on page 2 of its "Findings and Order" of January 8, 1963.

41. That the allegations made by the Commission in respect to said "agreement" are incorrect as a matter of fact.

42. That the applicant has not sold less than 2,500,000,000 pounds of steam per year at any time since 1955.

43. That the increase in all rate categories of 12¢ per thousand pounds of steam must produce additional revenues of at least $300,000 per year.

44. That less than half the allowance for depreciation set by the Commission is all that is necessary to provide for the capitalizable needs of the applicant's steam plant.

45. That the applicant has not needed to raise capital through the sale of its stock since 1952.

46. That the applicant is currently creating current asset surpluses from all its operations after provision for all needs of over $1,000,000 per year.

47. That the relative capital needs for the applicant's steam operations are smaller than the applicant's capital needs for its other operations.

48. That the relative earnings on capital of the applicant's steam operations have been approximately equal to those of its other operations.

49. That the increased rates will raise the rate of return on capitalization allocable to the applicant's steam operations well above 8% and well above the rate of return earned on the applicant's other operations.

50. That the increase in steam rates granted in this case is so far in excess of the applicant's earnings requirements and so far beyond a generous return

that it is an unconstitutional application of our statutory rate making formula.

51. That the increase in steam rates granted in this case will result in earnings on the applicant's investment which are far in excess of those earned by similar as well as highly profitable and speculative enterprises.

52. That the only evidence introduced as to the earnings of similar enterprises was that by Cleveland which would support a rate of return of less than 3% on the applicant's statutory valuation.

53. That Cleveland has recently begun a campaign to revitalize its downtown area.

54. That the applicant's increased rates will undermine said efforts.

55. That the increase sought by the applicant is a violation of good economic sense.

Respectfully submitted,

BRONIS J. KLEMENTOWICZ,
Director of Law,

WILLIAM T. MCKNIGHT,
Assistant Director of Law,

JAMES L. HARKINS, JR.,
Assistant Director of Law,
Counsel for the City of Cleveland.

Office-Supreme Court, U.S.
FILED
DEC 1 51965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 742.

CITY OF CLEVELAND, OHIO,
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,
and
CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondents.

BRIEF OF RESPONDENT, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

JOHN LANSDALE,
1857 Union Commerce Building,
Cleveland, Ohio 44115,
Counsel for Respondent,
The Cleveland Electric
Illuminating Company.

(Other Counsel on Inside of Cover.)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-8647

TABLE OF CONTENTS.

Questions Presented ---------- 1

Statement of the Case ---------- 3

Argument ---------- 6

I. No Federal Questions Are Presented on the Face of the Petition ---------- 6

II. Assuming Arguendo That Ratepayers Are Constitutionally Entitled to Require Regulation and to Require It at a Particular Level of Return or of Rates, the Only Question Presented by This Case Is Whether the Public Utilities Commission of Ohio Was Obliged as a Matter of Federal Law to Accept Witness Honaker's Opinion in Respect to the Allowable Return ---------- 8

A. Petitioner's Only Contention, When Its Constitutional Theory Is Viewed on the Terms and Circumstances of This Case, Is That the Commission Should Have Adopted the Opinion Testimony of One of Its Expert Witnesses 8

B. By Its Own Terms Petitioner's Constitutional Theory Is Inapplicable Here Since It Is Grounded on the Existence of a Monopoly and No Monopoly Is Presented in This Case ---- 10

III. A Determination by the Ohio Commission That the Use of a Clause Providing for Billing Adjustments Upon Stated Changes in Fuel Costs Is Reasonable Presents No Federal Constitutional Question ---------- 12

IV. This Court Should Not Be Required to Review a Regulatory Commission's Decision as to the Most Efficient Method of Making a Rate Increase Effective ---------- 15

Conclusion ---------- 18

TABLE OF AUTHORITIES.

Cases.

Black v. Cutter Laboratories, 351 U. S. 292 (1956) ---------- 18

Chicago, City of, v. Illinois Commerce Commission, 13 Ill. 2d 607, 150 N. E. 2d 776 (1958) ---------- 14

Cleveland, City of, v. Public Utilities Commission of Ohio, 137 Ohio St. 225, 28 N. E. 2d 599 (1940) ---------- 16

Cooper Tire & Rubber Co. v. Central Ohio Light & Power Co., 10 P. U. R. 3d 430 (P. U. C. O., 1955) ---------- 15

Dayton Power & Light Co. v. Public Utilities Commission of Ohio, 292 U. S. 290 (1934) ---------- 10

East Ohio Gas Company, Re, P. U. C. O. Proceeding No. 30,311 (1964) ---------- 16

El Dorado, City of, v. Arkansas Public Service Commission, 235 Ark. 812, 362 S. W. 2d 680 (1962) ---------- 15

Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591 (1944) ---------- 6

Hollis v. Kutz, 255 U. S. 452 (1921) ----------8, 11

Laclede Gas Company, Re, 46 P. U. R. 3d 277 (Mo. P. S. C. 1962) ---------- 14

Lindheimer v. Illinois Bell Telephone Co., 292 U. S. 151 (1934) ---------- 9

Market Street Railway Co. v. Railroad Commission of California, 324 U. S. 548 (1945) ---------- 10

McQuade v. Trenton, 172 U. S. 636 (1899) ---------- 17

Minnesota Rate Cases, The, 230 U. S. 352 (1913) --- 9

Norfolk, City of, v. Virginia Electric & Power Co., 197 Va. 505, 90 S. E. 2d 140 (1955) ---------- 14

Rice v. Sioux City Cemetery, 349 U. S. 70 (1955) -- 19

State ex rel. Hotel Continental v. Burton, 334 S. W. 2d 75 (Mo., 1960) ---------- 15

United Gas Corp. v. Mississippi Public Service Commission, 240 Miss. 405, 127 S. 2d 404 (1961) --- 15

Statutes.

Ohio Revised Code:

Sec. 4905.31(B) ----------5, 7, 13, 15

Sec. 4909.13 ---------- 5

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 742.

CITY OF CLEVELAND, OHIO,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,

and

CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Respondents.

BRIEF OF RESPONDENT, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

QUESTIONS PRESENTED.

Respondent excepts to the statement of questions presented at page 2 of the petition. Petitioner has stated questions which may have academic interest (but which are neither novel nor unresolved by competent judicial authority); however, they have no connection with "the terms and circumstances of the case" presently before this Court, as required by Rule 40(d)(1). When the terms and circumstances of this case are considered, the three questions which petitioner has attempted to state will be found to be the following, none of which poses an issue for review by this Court on a petition for certiorari:

1. Is a state regulatory commission, in determining a reasonable rate of return, to be applied to a

steam utility's fair value rate base found in accordance with the state statute, compelled by the Fourteenth Amendment to the United States Constitution to accept and follow the testimony of a single expert witness as to reasonable return in conflict with the testimony of other similar witnesses?

2. Is it "unconstitutional" to include, in the rate schedules of a steam utility, a provision, specifically authorized by state statute, providing for the automatic adjustment of steam rates, upward or downward, upon corresponding increases or decreases in the cost of fuel, the utility's principal item of expense?

3. Is a question of due process presented when a state regulatory commission puts into effect an increase in steam rates, otherwise lawful, effective with respect to usage shown by meter readings on and after the date of the order, where no evidence was submitted as to the effect thereof on petitioner and where the state court determined that the question was not properly before it?

STATEMENT OF THE CASE.

Respondent, The Cleveland Electric Illuminating Company (the Company), is engaged in the sale of steam heating service in a portion of downtown Cleveland, serving approximately 600 customers (R. 28).* The steam heating business is operated as a department of the Company, the main business of which is the supply of electric energy in northeastern Ohio, and is not separately financed or capitalized (R. 481-82). This proceeding arises out of an application for an increase in rates filed by the Company with The Public Utilities Commission of Ohio on April 27, 1961. In accordance with the applicable Ohio statutes, respondent filed certain exhibits with its application, the matter was referred to the Commission's staff for review, and the staff rendered a report on the matters involved (Petition, Appendix A, p. 18).

Respondent's application was opposed only by the City of Cleveland, the petitioner herein, which is one of the Company's steam customers. No other customer objected or testified and the rates approved by the state Commission were agreed to by its customers other than petitioner (Petition, Appendix A, p. 20). Hearings before the Commission consumed twenty-five hearing days, most of which were devoted to extensive cross-examination of the Company's inventory and valuation witnesses by the peti-

---

* Record references are to the transcript of the record before The Public Utilities Commission of Ohio. Pages 687-701, 742-748, 977-978, 1260-1266, 2249-2258 and 2448-2454 may be found in the Portion of Record Supplied by Appellant, accompanying the Brief of the City of Cleveland, Petitioner herein, before the Supreme Court of Ohio. Pages 34-41, 48-49, 63-65, 68-71, 465-469 673-718, and 740-750 may be found in the Appendix to the Answer Brief of Intervening Appellee before the Supreme Court of Ohio.

tioner (the record before the Commission contains approximately 2,600 pages, excluding exhibits).

The uncontradicted testimony demonstrated that the steam business suffers severe competition from other fuels. For small heating loads, respondent's central station steam cannot compete and in spite of the growth of downtown Cleveland, the number of respondent's customers has been in constant decline since 1950 (R. 37). Because of this competitive factor, respondent's application did not seek to achieve the rate of return to which respondent would otherwise be entitled (R. 36). Respondent's witnesses testified that the proper rates of return were 6.5% (R. 475) or not less than 6.66% (R. 517), respectively, on its fair value rate base. The order of the Commission allowed 3.53% (Petition, Appendix A, p. 34).

After the close of the hearings, the Company filed an amended application reducing the rates requested to a level agreed upon between the Company and its customers other than petitioner, who refused to consent (Petition, Appendix A, p. 20). The Commission found that the increase requested in the amended application would result in a rate of return of 3.53% on respondent's fair value rate base (which the Commission found to be $19,261,306) and held that such a return was not unjust or unreasonable (Petition, Appendix A, p. 34). In opposing the application, the City had presented a witness who testified, in effect, that a rate of return of 2.7% was more than enough (R. 2451). This was based on an alleged fair return on an imputed capitalization. The Commission chose not to follow this testimony, on the ground that the supporting data used by the witness was "too narrow to serve as a criterion" (Petition, Appendix A, p. 30). The Supreme Court of Ohio held that the argument of petitioner in this respect conflicted with the requirements of

the applicable Ohio statutes (Petition, Appendix B, pp. 37-38).

Respondent's steam rates have, since at least 1920, included a fuel adjustment clause which results in an increase or decrease in steam bills based on increases or decreases in the cost of coal, a principal expense item (R. 743). For some years the effect of this clause, as it then existed, was to reduce steam rates to respondent's customers, including petitioner, somewhat more than the actual savings realized by respondent through lower coal prices (R. 685). Petitioner objected to the overcompensating feature of this clause (as well as to the clause in any form), and, as a result, respondent, with the approval of the Commission, amended its fuel adjustment clause to eliminate its overcompensating feature (Petition, Appendix A, p. 31). The Commission found that the inclusion of such a clause in the Company's tariffs was reasonable (Petition, Appendix A, p. 35). Such a clause is specifically authorized by statute. Ohio Revised Code § 4905.31 (B).

Having granted a rate increase, the Commission then authorized respondent to apply the new rates to bills based upon meter readings (which are read throughout the month but only once a month for each customer (R. 706)) made after a date certain. This obviated any need for allocations of consumption and thus facilitated the billings. This plainly does not involve retroactivity, but rather a reasonable discrimination. There is no evidence in the record as to when the meters of any particular steam customer were read and, in particular, no evidence as to when petitioner's meter was read.

The City of Cleveland, petitioner herein, thereupon appealed directly to the Supreme Court of Ohio, in accordance with Ohio Revised Code § 4909.13. This respondent,

by leave of court, intervened as a party-appellee in such court. The Supreme Court affirmed the Commission's order. The City then filed this petition for certiorari.

ARGUMENT.

I. NO FEDERAL QUESTIONS ARE PRESENTED ON THE FACE OF THE PETITION.

Petitioner asserts that no statutory provisions are involved in this proceeding. We understand this to mean, as the Supreme Court of Ohio held (and, in fact, as petitioner conceded before that Court), that the order of The Public Utilities Commission of Ohio was in full conformity with the Ohio regulatory statutes and that no contention is made that these statutes are unconstitutional. Petitioner's position in this respect is difficult to reconcile with that portion of the petition which is, nonetheless, an open attack on the Ohio regulatory statutes. However, in view of petitioner's statement and the decisions of this Court which make it plain that the United States Constitution neither requires nor condemns any particular mode of public utility rate making (*Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591 (1944)), we assume that the nub of petitioner's contention is that the three actions by the Commission complained of are unconstitutional *on the facts of this case*. A brief examination of those facts shows that the only disputes here are questions of evidence and regulatory judgment. There are no federal questions in this case.

Petitioner's contention that, since the Constitution protects regulated utilities from confiscation of their property by low rates, the consumer has the constitutional right to require not only that the legislature (or the administrative agency to which power is delegated) regulate,

but that it regulate in a particular way, is interesting, but has no relationship to this case. As petitioner's own argument shows, it merely is objecting to the Commission's refusal to follow the opinion of one of its witnesses as to the "maximum fair earnings permissible" (Petition, Appendix A, p. 30). The Supreme Court of Ohio held that the finding of the Commission was in accord with the Ohio statutes (Petition, Appendix B, pp. 37-38). Petitioner's claim that inclusion of a purchased fuel adjustment clause in a utility's rate schedules is an unconstitutional delegation of legislative power is contrary to all decisions on this point (although there are, of course, varying views as to the reasonableness of such clauses in particular cases). In any event, since such a clause is expressly authorized by an Ohio statute (Ohio Revised Code § 4505.31(B)) and petitioner has expressly disclaimed the involvement of any statute here, no federal issue remains. Finally, petitioner's claim of "retroactive" rate-making, as petitioner's argument reveals, is merely an objection to the method by which the Commission put this rate increase into effect and, in addition, as the Supreme Court of Ohio held (Petition, Appendix B, p. 39), is an issue not properly raised at all in this proceeding. None of this presents "a federal question of substance."

II. ASSUMING ARGUENDO THAT RATEPAYERS ARE CONSTITUTIONALLY ENTITLED TO REQUIRE REGULATION AND TO REQUIRE IT AT A PARTICULAR LEVEL OF RETURN OR OF RATES, THE ONLY QUESTION PRESENTED BY THIS CASE IS WHETHER THE PUBLIC UTILITIES COMMISSION OF OHIO WAS OBLIGED AS A MATTER OF FEDERAL LAW TO ACCEPT WITNESS HONAKER'S OPINION IN RESPECT TO THE ALLOWABLE RETURN.

A. Petitioner's Only Contention, When Its Constitutional Theory Is Viewed on the Terms and Circumstances of This Case, Is That the Commission Should Have Adopted the Opinion Testimony of One of Its Expert Witnesses.

Petitioner asserts that public utility ratepayers are protected, under the Federal Constitution, against confiscation of their property through unlawfully high public utility rates. This theory has been rejected by every court to which it has been presented, including this Court. See *Hollis v. Kutz*, 255 U. S. 452 (1921), and cases collected at 12 A. L. R. 404. However, for the purposes of this petition, it is sufficient to point out that even if petitioner correctly states the law as an abstract principle, the only evidence to which it points as demonstrating that there has *in fact* been an unconstitutional confiscation of property in *this* case is the opinion testimony of a single witness, which testimony was in conflict with that of two other witnesses. Thus, unless this Court chooses to hold that a public utility ratepayer always presents a federal question of substance when he claims that rates allowed by a state commission are too high, the only question presented by petitioner is whether the Ohio Commission had to follow this particular witness' opinion as to the allowable return. It is submitted that this question, one of the weight of the evidence before

a regulatory commission, is simply not a federal question of substance.

Petitioner asserts (Petition, p. 5) that it introduced "the only evidence in this case as to what would be a confiscatory rate." Actually the testimony which it quotes is the witness' opinion as to the "maximum allowable dollar return" (R. 2451), which works out to approximately 2.7% on the rate base found by the Commission. There was, of course, other rate of return testimony, all of which is discussed in the Commission's opinion which is copied in Appendix A to the Petition (at p. 30).

Petitioner is not before this Court in any representative capacity but solely in its individual capacity as one of respondent's customers. The Company's other customers consented to the allowed increase in rates (Petition, Appendix A, p. 20). There is no evidence of petitioner's consumption, billings under the old or new rates, ability or inability to obtain other heating services or the relative costs of other heating methods, or any other data relevant to the question whether there is in fact a confiscation of its property. Petitioner relies solely on the quoted opinion evidence. This Court long ago held that a party could not rely solely on evidence of this type when it could have provided accurate data to support its constitutional claim. See *The Minnesota Rate Cases*, 230 U. S. 352, 465-66 (1913), where the Court said:

> "We are of opinion that on an issue of this character involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation * * *."

See also *Lindheimer v. Illinois Bell Telephone Co.*, 292 U. S. 151, 169 (1934).

Moreover, this Court has held that a commission is not constitutionally bound to accept any particular opinion evidence on any point. See, for example, *Market Street Railway Co. v. Railroad Commission of California*, 324 U. S. 548, 560 (1945). There were, as usual, divergent opinions on rate of return in evidence in this case (compare R. 475, 517 and 2451). The Commission could lawfully give such weight as it deemed proper to these opinions and it did not violate the Fourteenth Amendment because it chose to follow one and not another. This Court stated the rule clearly in *Dayton Power & Light Co. v. Public Utilities Commission of Ohio*, 292 U. S. 290 (1934), another appeal from a decision by the Ohio Commission in a rate case, when in speaking of the opinions of expert witnesses it said (292 U. S. 290, 299):

> "If they have any probative effect, it is that of expressions of opinion by men familiar with the gas business and its opportunities for profit. But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury * * * or to a judge * * * or to a statutory board." [Citations omitted.]

B. By Its Own Terms Petitioner's Constitutional Theory Is Inapplicable Here Since It Is Grounded on the Existence of a Monopoly and No Monopoly Is Presented in This Case.

Petitioner does not contend that respondent's customers are required by law to take respondent's steam service but argues that they are required to do so by practical considerations. "Practical" compulsion, even if it exists, is not constitutionally identical with legal coer-

cion. See, for example, *Hollis v. Kutz, supra.* On the undisputed evidence, however, there is no such "practical" compulsion to take this respondent's steam service.

Petitioner says that respondent "has a monopoly on the sale of steam heating service in downtown Cleveland" (Petition, p. 3). It implies that this service is one of the "necessities of life" (Petition, p. 11). Respondent earnestly wishes that this were so. Unfortunately it is not. Respondent has no legal monopoly in the supply of central station steam service. It has no practical monopoly in the supply of heating service. The record contains considerable testimony, all uncontradicted, as to the competitive aspects of the steam heating business and the effects of that competition upon the Company.

Competition for heating purposes is primarily from gas (R. 36, 808). For small heating loads, gas has proved so much more attractive to customers than central station steam service that "central station steam simply cannot compete" (R. 36-37). The result has been a continued loss of customers by the Company's steam department (R. 37, see also R. 63, 812). Competition arises also from use of oil burners (R. 64). Similar competitive problems have been presented in respect to use of the Company's steam service for air conditioning purposes (R. 759). Because of the extremely competitive nature of the heating business, the Company cannot earn the rate of return to which it is entitled (R. 467). For this reason the Company agreed to rates which would yield a rate of return substantially lower (indeed, almost 50% lower, see Commission Order, Petition, Appendix A, p. 30) than the rate of return to which it would be entitled if it could earn it (R. 36). In so doing, the Company reduced its request, made in its initial application, from rates which would yield a return

of 4.0%, itself far less than a lawful return (R. 52), to rates yielding 3.53% (Petition, Appendix A, p. 31).

We do not believe that any constitutional right exists in the public to require the regulation of the sale price of any commodity. This is a legislative question. However, on the uncontroverted record the factual assumption which underlies the City's specious constitutional argument simply does not exist in this case. This case does not involve a utility service which must be taken by a customer, practically speaking. Central station steam service is not a "necessity of life." This Company's steam customers can use other means to accomplish the same ends and many have done so.

III. A DETERMINATION BY THE OHIO COMMISSION THAT THE USE OF A CLAUSE PROVIDING FOR BILLING ADJUSTMENTS UPON STATED CHANGES IN FUEL COSTS IS REASONABLE PRESENTS NO FEDERAL CONSTITUTIONAL QUESTION.

Petitioner asserts that the Ohio Commission has given respondent "the unrestrained power to adjust its rates in accordance with a coal escalation formula" (Petition, p. 15). But nothing is "unrestrained" which must be accomplished "in accordance with a * * * formula."

Respondent has had a fuel adjustment clause in its steam rate schedules for at least 45 years (R. 743). Prior to the order of the Ohio Commission herein involved, the existing clause, when triggered by the requisite increase or decrease in coal costs, reflected in rates somewhat more than the resultant savings or increase in costs (R. 683). This differential served to account for changes in other coal-related costs (R. 693) and to compensate for the lag necessarily created by the Company's billing procedures (R. 677) and the step effect of the clause itself (R. 701).

As the result of a more or less regular decline in coal costs, the effect in recent years has been to pass on to respondent's customers greater savings than the Company actually realized through the reduction in its expenses (R. 685), and respondent's customers other than petitioner wished the clause retained in the same form (R. 685). The coal clause was, however, amended at respondent's request to eliminate the possibility that, in the event of an increase in coal cost, the Company would receive more than the actual increase in cost or, correspondingly, that, upon coal cost decreases, the Company's customers would enjoy a greater benefit than the actual amount of the decrease.

Since most of petitioner's arguments go to the previous clause, they are irrelevant. It should be noted, in passing, that the assertion that the Ohio Commission does not supervise the clause is simply untrue; respondent renders monthly reports to the Commission on fuel clause adjustments. Petitioner's sole point, apparently, is that use of an escalation clause of any sort is an unconstitutional delegation by the Commission of its powers to the utility. Petitioner has stated that no statutory provisions are involved in this case. It is apparent, therefore, that this issue is disposed of by Ohio Revised Code § 4905.31 (B), which specifically provides for escalation clauses in rate schedules:

> "Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code do not prohibit a public utility from filing a schedule or entering into any reasonable arrangement with another public utility or with its customers, consumers, or employees providing for:
>
> * * * * *
>
> "(B) A sliding scale of charges, including variations in rates based upon stipulated variations in cost as provided in the schedule or arrangement;"

Even in the absence of statute, clauses of this type have been utilized in many jurisdictions, see *Re Laclede Gas Company*, 46 P. U. R. 3d 277 (Mo. P. S. C. 1962), and serve a useful purpose. As the court said in *City of Norfolk v. Virginia Electric & Power Co.*, 197 Va. 505, 90 S. E. 2d 140 (1955), in holding a purchased gas adjustment clause proper and "highly remedial" (197 Va. 505, 516, 90 S. E. 2d 140, 148):

> "The proposed escalator clause is nothing more or less than a fixed rule under which future rates to be charged the public are determined. It is simply an addition of a mathematical formula to the filed schedules of the Company under which the rates and charges fluctuate as the wholesale cost of gas to the Company fluctuates. Hence, the resulting rates under the escalator clause are as firmly fixed as if they were stated in terms of money."

The delegation of power would seem to be a state question in any event. The question whether this sort of clause is an unlawful delegation of power by the administrative agency was discussed in *City of Chicago v. Illinois Commerce Commission*, 13 Ill. 2d 607, 150 N. E. 2d 776 (1958), also involving a purchased gas adjustment clause, where the court followed the *Virginia Electric & Power Co.* case, *supra*, saying (13 Ill. 2d 607, 618-19, 150 N. E. 2d 776, 782):

> "We cannot find that the public or consumer has lost, nor the Commission abandoned, any rights or powers by the authorization of the automatic adjustment clause. * * * Since there has been neither loss of substantial rights to the consuming public, nor abandonment of the administrative function, we find no abuse of discretion by the Commission in this pragmatic adjustment."

See also *State ex rel. Hotel Continental v. Burton*, 334 S. W. 2d 75 (Mo., 1960); *City of El Dorado v. Arkansas Public Service Commission*, 235 Ark. 812, 362 S. W. 2d 680 (1962); *United Gas Corp. v. Mississippi Public Service Commission*, 240 Miss. 405, 127 S. 2d 404 (1961). These cases uniformly point out that the end result of the inclusion of fuel costs such as these in the rate schedule is equitable protection of both the ratepayer and the utility, guaranteeing each a fair charge without the repeated necessity of applications to the regulatory commission for relief, with attendant delays and expense. Insofar as supervision is concerned the Ohio Commission has, and has always had, power to investigate, either on its own motion or on complaint, any possible abuse if and when it should arise (Ohio Revised Code § 4905.31) and has, when necessary, exercised this power. See, for example, *Cooper Tire & Rubber Co. v. Central Ohio Light & Power Co.*, 10 P. U. R. 3d 430 (P. U. C. O., 1955). While there may be disagreement as to the form of the clause or its advisability in a particular case, it is obvious that such clauses are not per se unlawful.

IV. THIS COURT SHOULD NOT BE REQUIRED TO REVIEW A REGULATORY COMMISSION'S DECISION AS TO THE MOST EFFICIENT METHOD OF MAKING A RATE INCREASE EFFECTIVE.

Petitioner speaks dramatically of a discriminatory and retroactive rate increase. As petitioner itself concedes, it is merely complaining of the mechanical method by which respondent's steam rate increase was put into effect. All the Commission actually did was permit respondent to put the rate into effect with respect to usage reflected by meter readings after a specific date, rather than by usage after a specific date.

This has long been the practice in Ohio. For example, this petitioner made precisely the same argument in rate litigation reported as *City of Cleveland v. Public Utilities Commission of Ohio*, 137 Ohio St. 225, 28 N. E. 2d 599 (1940). The same technique was followed by the Ohio Commission, subsequent to its decision in this case, in a gas rate proceeding in which this petitioner was an active party, *Re East Ohio Gas Company*, P. U. C. O. Proceeding No. 30,311 (1964), *and petitioner did not object.*

The reasons for using this method are simply mechanical, as petitioner says, but that does not make them any the less persuasive. If the same rates are applied to all of the consumption involved in a particular bill the computation is simple, being no different, arithmetically, from any other billing. To divide periods of use between successive rate schedules on any other basis would involve costly allocations. And, since respondent's steam service is not monitored on a minute-to-minute basis, such apportionments would necessarily be judgments and would give rise to disputes which could never be resolved to the satisfaction of every individual ratepayer. Every customer would be a potential litigant, not in respect to the rate increase, but on the apportionment of his bill after that increase was found reasonable.

This question, therefore, presents merely a dispute over a matter subject to the judgment of the regulatory commission. And, although petitioner admits this when it says that some other method could have been devised (Petition, p. 9), petitioner offered no evidence at all on this. The question, therefore, like the other questions posed by petitioner, is purely an abstract one.

More important, this question was determined by the Supreme Court of Ohio entirely on procedural grounds and thus is not ripe for determination by this Court. The

complete discussion of the point by the Supreme Court of Ohio is as follows (3 Ohio St. 2d 82, 85, 209 N. E. 2d 424, 426):

> "For its fourth proposition appellant asserts that the rates set by the commission were applied retroactively, since they were ordered by the commission to become effective on the first billing date subsequent to the filing of such adjusted tariff schedules, and the company by its billings charged customers at the increased rates from the date on which the adjusted tariff schedules were filed.
>
> "This matter of the date on which the rate increase was first charged to the customer is a matter between the customer and the company *which will not be considered by this court in this appeal* from an application of the company to the Public Utilities Commission for an increase in its rates and charges." (Emphasis supplied.)

This Court will not concern itself with hypothetical federal questions when their actual decision in a case turns upon a separate and independent state ground, including a procedural ground. *McQuade v. Trenton,* 172 U. S. 636, 639 (1899), where this Court said:

> "The right of the defendant to damages was, however, assumed in the opinion of the Vice Chancellor, who disposed of the answer by saying that the defendant had mistaken his remedy, and must resort to another proceeding against the city for his damages. This was beyond all doubt a ruling broad enough to support the decree regardless of any Federal question that possibly might have been raised from the allegation of the answer. * * * [I]t is quite evident that a Federal question was not necessarily involved in the case, and hence that this court has no jurisdiction."

This principle applies even where a state court discusses a federal issue, if its judgment rests on adequate state grounds. *Black v. Cutter Laboratories*, 351 U. S. 292, 298 (1956). In this case, of course, the Supreme Court of Ohio expressly held that this question cannot be raised in this appeal from a rate proceeding before the Public Utilities Commission of Ohio.

The Supreme Court of Ohio held that this question "is a matter between the customer and the company" (3 Ohio St. 2d 82, 85, 209 N. E. 2d 424, 426). Obviously, it is a matter which can and should be raised only by *affected* customers. Since respondent's other customers consented to the rate increase here involved (Petition, Appendix A, p. 20), petitioner speaks only for itself and there is no evidence whatsoever that *petitioner's* own steam bill was in any way affected by the method in which this rate increase was put into effect.

This is not a question of retroactivity at all, but rather of discrimination with respect to individual customers and whether the discrimination is reasonable under the circumstances. The record does not show how any particular customer was affected. It does show that each customer was probably affected differently.

CONCLUSION.

None of the theoretical issues urged by petitioner actually involve the facts of this case. The so-called "confiscation" question is merely an assertion that the Ohio Commission should have adopted the opinion of one expert witness on rate of return instead of another's. The so-called "delegation of powers" question, unless it is an attempt to hold an Ohio statute unconstitutional (which petitioner expressly disavows), merely challenges the

reasonableness of the inclusion of a fuel cost clause in respondent's rate schedule. The so-called "retroactivity" question was not properly presented to the Supreme Court of Ohio and hence is not properly before this Court. And on none of these points is there any showing of actual prejudice to petitioner. As this Court said in *Rice v. Sioux City Cemetery*, 349 U. S. 70, 74 (1955):

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues."

Respectfully submitted,

JOHN LANSDALE,
1857 Union Commerce Building,
Cleveland, Ohio 44115,
Counsel for Respondent,
The Cleveland Electric
Illuminating Company.

LEE C. HOWLEY,
Vice President and General Counsel,

HARRY G. FITZGERALD, JR.,
DONALD H. HAUSER,
The Cleveland Electric Illuminating Company,
55 Public Square,
Cleveland, Ohio 44113,

ALAN P. BUCHMANN,
1857 Union Commerce Building,
Cleveland, Ohio 44115,
Of Counsel.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 10 1966
JOHN E. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 742.

CITY OF CLEVELAND, OHIO,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,

and

CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Respondents.

ANSWER BRIEF OF PETITIONER THE CITY OF CLEVELAND.

BRONIS J. KLEMENTOWICZ,
Director of Law,

WILLIAM T. MCKNIGHT,
JAMES L. HARKINS, JR.,
Assistant Directors of Law,
204 City Hall,
Cleveland, Ohio 44114,
Attorneys for Petitioner.

January 10, 1966.

(Other Counsel on Inside of Cover.)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-0647

TABLE OF CONTENTS.

Statement ---------- 1

Argument ---------- 2

I. Cleveland Has Preserved Its Rights ---------- 2

II. "Cleveland Introduced the Only Evidence About What Return Would Confiscate the Ratepayer's Property * * *." ---------- 4

III. The Coal Escalation Formula ---------- 5

IV. The Commission Has Arbitrarily Granted a Discriminatory Rate Increase Which Violates the Petitioner's Freedom of Contract ---------- 6

Conclusion ---------- 8

TABLE OF CASES.

Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281 (1944) ---------- 1

Hollis v. Kurtz, 255 U. S. 452 (1921) ---------- 5

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 742.

CITY OF CLEVELAND, OHIO,
Petitioner,
v.
PUBLIC UTILITIES COMMISSION OF OHIO,
and
CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondents.

ANSWER BRIEF OF PETITIONER THE CITY OF CLEVELAND.

STATEMENT.

This brief is in answer to the briefs of the respondents, the Public Utilities Commission of Ohio and the Cleveland Electric Illuminating Company. Both respondents oppose Cleveland's "Petition for Writ of Certiorari to The Supreme Court of the State of Ohio."

Cleveland in this case retains its historic role as a representative of the ratepayers located within its municipal boundaries. The respondents' contentions to the contrary are not supported anywhere in the evidence of this case. Cleveland's role as a representative of the ratepayer has been a very long and distinguished one. For instance, it was the activity of the City of Cleveland before the Federal Power Commission which resulted in the most important landmark case in the field of utility law: *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281 (1944).

ARGUMENT.

I.

CLEVELAND HAS PRESERVED ITS RIGHTS.

The Public Utilities Commission of Ohio (hereinafter referred to as the "Commission") submitted only one argument against Cleveland's petition. The Commission, for the first time in this case argues that Cleveland has not preserved its rights to appeal the matters brought before this Court. The fact that the Commission did not choose to make this argument in its answer brief before the Supreme Court of Ohio indicates the lack of substance in the Commission's argument.

The initial brief of Cleveland before the Supreme Court of Ohio was replete with argument about all of the Federal questions presented in our petition. For instance, the very first argument presented in our initial brief was headed as follows:

"ARGUMENT.

PART I.

THE RATES SET BY THE COMMISSION CONFISCATE THE RATEPAYER'S PROPERTY IN VIOLATION OF FEDERAL LAW.

The Fourteenth Amendment to the Federal Constitution Protects the Consumer Against Confiscation of His Property Through Excessive Utility Rates."

The weakness in the Commission's sole argument against Cleveland's petition is further illustrated by the failure of the Cleveland Electric Illuminating Company to even mention in its brief the argument presented by the Commission. The Supreme Court of Ohio has said nothing to indicate that there was any procedural defect in the Federal questions raised in Cleveland's notice of appeal

and briefs before the Supreme Court of Ohio except in respect of the retroactive application of the rate increase.

The Commission bases its argument upon defects which it now claims exist in our notice of appeal to the Ohio Supreme Court. Again, using the first question presented in our petition as an example, it should be noted that nine of the citations of error in our notice of appeal (Numbers 44 through 52 shown on pages 14 and 15 of the Commission's brief in opposition to Cleveland's petition) list the salient facts which support Cleveland's contention that through excessive rates the Commission confiscated Cleveland's property and the property of the other ratepayers contrary to the Fourteenth Amendment to the Federal Constitution.

Cleveland sharply raised the constitutional questions of the denial of due process of law under both Ohio and Federal law by stating these issues in the language adopted by the Commission itself. The Commission in the very last paragraph of its discussion of the case (page 34 of Cleveland's petition) stated:

> "Fourth, counsel urges that the Fourteenth Amendment to the United States Constitution with regard to due process and equal protection of the laws are violated by the laws of Ohio. Since the Commission is not empowered to pass on the constitutionality of statutes it is given to administer, the Commission does not attempt to decide the issue in its various ramifications." (Emphasis added.)

Cleveland in its fiftieth assignment of error stated:

> "That the increase in steam rates granted in this case is so far in excess of the applicant's earnings requirements and so far beyond a generous return that it is an unconstitutional application of our statutory rate making formula." (Emphasis added.)

II.

"CLEVELAND INTRODUCED THE ONLY EVIDENCE ABOUT WHAT RETURN WOULD CONFISCATE THE RATEPAYER'S PROPERTY * * *."

The heading for this argument is copied from page 12 of our petition. The respondents have failed to show one iota of evidence in contradiction of that statement.

The Company did have two witnesses on rate of return. Their testimony touched only upon the abstract subject of a fair rate of return on a rate base that is divorced from reality. The Company's witnesses did not concern themselves with the Company's actual earning requirements.

Moreover, the Commission admitted that it did not concern itself with the actual earning requirements of the Company. The Commission claims that it is under no compulsion to deal with the realities of the Company's needs.

The Commission based this conclusion upon the decisions of the Supreme Court of Ohio which "* * * have held that the actual earnings requirements of a company 'are not really material in a proceeding of this kind.'" (Petition, Appendix A, p. 31.) The Commission has further stated that it was not empowered to pass upon constitutional questions (Petition, Appendix A, p. 34).

The Company misleads this Court by suggesting that the issue of confiscation raised by Cleveland involves the weight of evidence between the sharply conflicting testimonies of several rate of return witnesses. *This case involves the willful failure of the Commission to consider the only evidence* about what return would confiscate the ratepayer's property.

The only evidence concerning what would constitute a confiscatory charge was presented by Cleveland Witness

Honaker, who testified that the maximum allowable return is $525,000 per year (Tr. 2451). He showed that such a return would consist of an 8% rate of return on composite capitalization and a 13% rate of return on the common equity portion thereof (Tr. 2451). Mr. Honaker testified that even that return might be excessive. He stated on pages 2451-2 of the record that

> "Anything beyond this is completely out of line with the generally accepted concept of fair return. In fact, these percents are entirely too high and at first blush shock the conscience, but my stated opinion is premised upon an extreme situation, i.e., earnings outside a broad and generous zone."

The Commission willfully disregarded this evidence and on page 9 of its final order in this case determined that "* * * The dollar return to which applicant is entitled for purposes of this proceeding is $680,311.11 * * *." (Petition, Appendix A, p. 34.)

The Company has overstated the holdings of the cases which it has cited. For instance the case of *Hollis v. Kurtz*, 255 U. S. 452 (1921) is *sui generis*, since it involved a special price advantage that was bargained for by the Federal government. In the *Hollis* case the utility did not earn an excessive return on its total operations as in the instant case.

III.

THE COAL ESCALATION FORMULA.

The Company has said nothing which really challenges the point made by Cleveland in its petition which stresses that the Commission has given the Company the unrestrained power to adjust its rates in accordance with a coal escalation formula. Cleveland has shown in its petition that this clause has not worked effectively at any time

during its forty years of existence. Cleveland showed that if the cost of coal went up one dollar over the last decade, the Company's charges to its customers would increase by one dollar and forty cents.

How else can the actual facts of the operation of this coal escalation formula be explained except by the obvious conclusion that the Commission never checks into the working of such formulae and that the Commission has thereby in effect unconstitutionally delegated its regulatory powers to the Company? The only assertion that the Company has been able to make to the contrary is its claim that it files monthly reports with the Commission. It is quite evident that *the Commission does no more than entomb these reports* in its files.

If the Commission actually exercised its regulatory authority over these escalation formulae, the cases cited by the Company in support of the allowance of escalation formulae would be in point. Each of the cases cited by the Company is predicated upon the proposition that the regulatory body in question had not abandoned its administrative functions. In this case the Commission has abandoned its regulatory function for over forty years.

IV.

THE COMMISSION HAS ARBITRARILY GRANTED A DISCRIMINATORY RATE INCREASE WHICH VIOLATES THE PETITIONER'S FREEDOM OF CONTRACT.

This is the *only one of the errors* claimed in our petition *concerning which the Supreme Court of Ohio has raised any procedural questions.* The Supreme Court of Ohio has stated:

> "This matter of the date on which the rate increase was first charged to the customer is a matter between

> the customer and the company which will not be considered by this court in this appeal from an application of the company to the Public Utilities Commission for an increase in its rates and charges." (Petition, Appendix B, p. 39.)

This error arises from the order of the Commission that "* * * such tariff schedules may become effective on the first billing date subsequent to the filing of such tariff schedules." (Petition, Appendix A, p. 35.) The natural means for seeking relief from the oppressive features of this order is through an appeal of the order itself, instead of through collateral proceedings. Cleveland has chosen the obvious natural means for redressing this error.

The Supreme Court of Ohio does not suggest any alternative route that Cleveland can or could have taken to seek relief from the discriminatory manner in which the rate increase was put into effect. The Supreme Court of Ohio did not suggest such an alternative because there never has been such an alternative. The Company has not suggested an alternative because there is no alternative. The ratepayer's constitutional rights cannot be denied because of an erroneous suggestion that he might have some other means of relief.

The Company has offered nothing in contradiction of our point that the method set by the Commission for effecting the rate increase violated the ratepayer's freedom of contract. The Company has conceded on page 18 of its brief that the rate increase was applied in a discriminatory manner:

> "* * * The record does not show how any particular customer was affected. It does show that each customer was probably affected differently."

CONCLUSION.

The City of Cleveland is before this Court because both the Commission and the Supreme Court of Ohio have refused to consider the rights of the ratepayer under the Fourteenth Amendment to the Federal Constitution. The Commission has forthrightly stated that it would not pass upon questions of Federal law. The Supreme Court of Ohio has been silent upon these questions. These questions are of enormous importance and should not be ignored.

WHEREFORE, the petitioner prays that a writ of certiorari directed to the Supreme Court of the State of Ohio may issue under the seal of this Honorable Court in this cause and that upon such review the judgment of the Supreme Court of Ohio entered on July 7, 1965, and the "Findings and Order" of the Commission of January 8, 1963, be vacated, reversed, and set aside and that this case be remanded to the Supreme Court of Ohio with instructions to proceed in accordance with the rulings of this Court.

Respectfully submitted,

BRONIS J. KLEMENTOWICZ,
Director of Law of Cleveland,

WILLIAM T. MCKNIGHT,
Assistant Director of Law,

JAMES L. HARKINS, JR.,
Assistant Director of Law,
City Hall, Room 204,
Cleveland, Ohio 44114,
Attorneys for Petitioner.